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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

ROBERT C. JUBELIRER AND MATTHEW J. RYAN,
Appellants

v.

RICHARD VIETH, et al.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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JUNE 10, 2002

QUESTIONS PRESENTED

1. Whether, under the constitutional principle of one-person, one-vote, a State must justify a population deviation of only 0.003% (19 persons) in a congressional redistricting statute.

2. Whether plaintiffs challenging a congressional redistricting statute meet their burden of proof, to show that population differences among districts could have been reduced by a good-faith effort to draw districts of equal population, merely by proffering an abstract zero-deviation map that had neither been put before the state legislature nor drawn to incorporate the legitimate polices of the legislature that are implicit in the enacted plan.

3. Whether a population deviation of 0.003% in a congressional redistricting plan is justified, when the legislature rejected competing plans with larger deviations, when the enacted plan gives each major party an equal number of districts in which it enjoys a majority of registered voters, protects the senior member of the state's congressional delegation, maintains majority-minority districts and creates an open seat in an area of population growth and when eliminating the deviation in the enacted plan would increase the number of split voting precincts that burden local election officials.

4. Whether a three-judge court, after holding a congressional redistricting statute unconstitutional, may issue a mandatory injunction to the state legislature, directing it to enact a new congressional redistricting plan and to submit the new statute to the court for federal judicial review and approval.

PARTIES

The parties to this appeal are the Presiding Officers of the Pennsylvania General Assembly, Robert C. Jubelirer, Lieutenant Governor and President *Pro Tempore* of the Senate of the Commonwealth of Pennsylvania and Matthew J. Ryan, Speaker of the House of Representatives of the Commonwealth of Pennsylvania (Appellants herein and Defendants below), and Richard & Norma Jean Vieth and Susan Furey (Appellees herein and Plaintiffs below).[1]

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[1] The Governor of Pennsylvania Mark Schweiker, then-Secretary of the Commonwealth Kim Pizzingrilli and the Commissioner of the Bureau of Commissions, Elections and Legislation Richard Filling ("Executive Officers") were also named defendants below. Executive Officers have also filed an appeal from the April 8, 2002 order of the three-judge court.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

INTRODUCTION

On April 11, 2002, Appellants filed a Notice of Appeal to this Court under 28 U.S.C. §1253 from the opinion and order of the three-judge court entered April 8, 2002 in Civil No. 1:CV-01-2439 (U.S. District Court for the Middle District of Pennsylvania) (Nygaard, C.J., Rambo & Yohn, D.J.). A copy of the Notice of Appeal appears in the Appendix ("App.") at 1a-2a.

The three-judge court declared a Pennsylvania statute, Act No. 2002-1 ("Act 1"), unconstitutional under

U.S. CONST. art. I, §2 (the principle of one-person, one-vote) and enjoined its implementation by defendants. In Act 1 the Pennsylvania General Assembly established the boundaries of the 19 congressional districts apportioned to Pennsylvania under the 2000 Census. This Jurisdictional Statement, submitted pursuant to Supreme Court Rule 18.3, supports this Court's jurisdiction and shows that this appeal presents substantial and important questions on which this Court should exercise plenary review and allow full briefing and oral argument.

OPINIONS BELOW

The April 8, 2002 majority opinion and order and the dissenting opinion of Judge Yohn are reported at 195 F. Supp.2d 672 and are available electronically at 2002 U.S. Dist. LEXIS 6188 and 2002 WL 530870. *See* App. at 3a-15a (*per curiam* opinion), 16a-17a (order) and 18a-22a (dissenting opinion). Citations herein are to 195 F.Supp.2d and to the Appendix.

JURISDICTION

Appellate jurisdiction to review the opinion and order below is provided by 28 U.S.C. §1253, which states:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and a hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

The three-judge court was convened pursuant to 28 U.S.C. §2284(a), which provides: "A district court of three

judges shall be convened ... when an action is filed challenging the constitutionality of the apportionment of congressional districts[.]" The majority opinion and order below declared Act 1 (which embodied a congressional redistricting plan) unconstitutional, permanently enjoined its implementation and contained a mandatory injunction compelling the state legislature to make new law and to submit such enactment to the court for federal judicial review and approval. The present appeal thus fits squarely within Section 1253 and probable jurisdiction should be noted. *See Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (Supreme Court "jurisdiction over interlocutory orders under §1253 is confined to orders granting or denying a preliminary injunction"); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (entertaining appeal pursuant to Section 1253 from order enjoining use of state legislative redistricting plan); *Hunt v. Cromartie*, 532 U.S. 234 (2001) (entertaining appeal pursuant to Section 1253 from order enjoining use of congressional redistricting plan pursuant to Section 1253); *see also White v. Register*, 412 U.S. 755 (1973) (where three-judge court grants both declaratory relief *and* injunctive relief, Court can review both under Section 1253).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. art. I, §2, cl. 1 provides in pertinent part, "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States ... ." U.S. CONST. art. I, §4, cl. 1 provides in pertinent part, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ... ."

STATEMENT OF THE CASE

A. Factual Background

Under the 2000 Census, Pennsylvania's total population was 12,281,054, making the "ideal" population for each of Pennsylvania's 19 congressional districts 646,371 or 646,372. Pennsylvania lost 2 seats in Congress (going from 21 to 19) as a result of reapportionment following the 2000 Census. The loss of 2 seats in conjunction with population growth made it necessary to increase the size of congressional districts in Pennsylvania by approximately 100,000 persons. Moreover, during the last decade, Pennsylvania experienced significant population shifts, in particular, decreased population in the large urban centers (Pittsburgh and Philadelphia), yet significant growth in the Philadelphia suburbs, in the counties of the Poconos region and in southcentral Pennsylvania. As a result, in 2002, substantial changes were required in congressional districts in order to comply with the one-person, one-vote principle.

Act 1 became law on January 7, 2002. Based on the 2000 Census data, of the 19 congressional districts Act 1 established, the largest congressional district was only 9 persons over, and the smallest district was only 10 persons under, the ideal population. This 19-person difference between the largest and smallest districts calculates to a total population deviation of 0.003%. The General Assembly rejected competing plans that had higher deviations, including one that closely resembled the enacted plan but that had a deviation of 24 persons. No proposed plan was put before the General Assembly for its consideration that had a lower population deviation than the enacted plan.

The congressional redistricting plan contained within Act 1 embodied a number of compromises between the Pennsylvania House and Senate on legitimate political and legislative goals. The redistricting plan established by Act 1 maintained majority-minority districts for two seats in Philadelphia, protected the most senior member of the State congressional delegation (Congressman John Murtha), created an open seat acknowledging the population growth in the southeast part of the state, and paired the residences of four incumbents who had not announced previously an intent to retire (Democrat Congressmen Borski & Hoeffel in new District 13 and Republican Congressman Gekas & Democrat Congressman Holden in new District 17). These goals, as well as the General Assembly's efforts to reduce the total population deviation among districts, were reflected in the legislative debates on the bill (SB 1200) that became Act 1.

B. Procedural History

On January 11, 2002, Plaintiffs filed an Amended Complaint[2] for Declaratory and Injunctive Relief in the United States District Court for the Middle District of Pennsylvania against Presiding Officers, Executive Officers and the Commonwealth. App. at 25a-45a. Plaintiffs alleged that Act 1, *inter alia*, denied or abridged their right to vote for their Representative to the United States Congress, in violation of U.S. CONST. art. I, §§2 and 4 and amend. XIV, §2.[3] The three-judge court was

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[2] The initial complaint, filed December 27, 2001, challenged the 1992 congressional districting plan as unconstitutional in light of the 2000 Census data.

[3] Plaintiffs also alleged that Act 1 denied them equal protection of the laws, constituted an abridgment of the privileges and immunities of citizenship, and denied or abridged

convened to entertain the challenge, and on March 11-12, 2002, heard evidence from the parties. Each side then filed proposed findings of fact and conclusions of law.

C. The Decision Below

In the majority opinion issued April 8, 2002, Judges Nygaard and Rambo declared Act 1 unconstitutional under the principle of one-person, one-vote and enjoined its implementation by Defendants.[4] Judge Yohn dissented.

Attempting to follow the framework set forth in *Karcher v. Daggett*, 462 U.S. 725 (1983), for one-person, one-vote challenges, the court found that Plaintiffs had sustained their burden to show that "the differences in district-to-district population could have been reduced or eliminated altogether by a 'good-faith effort to draw districts of equal population.'" 195 F.Supp.2d at 675 (quoting *Karcher*, 462 U.S. at 730); App. at 7a. To support this conclusion, the court relied upon a map ("Alternative Plan 4") submitted by Plaintiffs, which was alleged to achieve "zero deviation without splitting any precincts among congressional districts and split[ting] fewer

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their right to free association as guaranteed by amend I. *See* Amended Complaint; App. at 41a-43a. On February 22, 2002, the three-judge court dismissed these claims, leaving only the one-person, one-vote claim. App. at 23a-24a. The court also dismissed the Commonwealth as a defendant on all counts. *Id.*

[4] Following the invalidation of Act 1, on April 17, 2002, the Pennsylvania General Assembly passed a bill containing a revised congressional redistricting plan. On April 18, 2002, the Governor signed the bill into law as Act No. 2002-34. Act 1 will still be used for this congressional election cycle, but will be superseded by Act 34 for the 2004 congressional elections. On April 23, 2002, the three-judge court stayed the injunction imposed by the April 8, 2002 order.

municipalities than Act 1." *Id.*; App. at 7a. In footnote 3, the court rejected the Defendants' contention that Alternative Plan 4 could not be considered for the purpose of satisfying the first prong of *Karcher*:

> [Defendants] argue that Plaintiffs must meet their burden under the first prong of the *Karcher* test only by relying on maps and/or redistricting plans that have a lower population deviation than the one enacted *and* that were presented to the legislature. We disagree. Although in *Karcher*, the legislature had before it other plans with less deviation, the [Supreme] Court never endorsed such a requirement. Instead, the Court focused on whether a plan with less deviation was possible. ... If we were to adopt the limited analysis suggested by the Defendants, we would be adopting a view that would isolate grossly disproportionate plans from constitutional scrutiny on the sole basis that such plans constitute the plan with the least deviations *available*. *Karcher* is wrought with references indicating that the least deviation *possible* is that which should govern the analysis.

Id. at 275-76 n.3 (emphasis original); App. at 8a.[5]

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[5] Defendants' position was and is slightly, but materially, different than the court's statement of the issue. Defendants argued that plaintiffs could only meet their burden by proffering a redistricting map with lower deviation that had *either* been put before the legislature *or* that tracked the legitimate objectives of the legislature as represented by the enacted plan. Defendants contended that relying on an abstract, hypothetical zero-deviation plan would reduce the *Karcher* test to a mere exercise in long division.

The court also rejected Defendants' argument that the total deviation of 19 persons (0.003%) was too small to rise to a constitutionally significant level. Relying on *Karcher*, the court concluded that "the population deviation in Act 1, even though relatively small, enables the Plaintiffs to satisfy *Karcher*'s first prong and shifts to the Defendants the burden of proving justification." *Id.* at 676; App. at 10a. Judge Yohn agreed with this portion of the majority opinion. *Id.* at 679; App. at 18a.

While acknowledging that the "burden borne by the State [under prong two of the *Karcher* test] varies inversely with the magnitude of the population deviation," *Id.* at 677 (citing *Karcher*, 462 U.S. at 741); App. at 11a, the court went on to reject, as a "pretext," Defendants' contention that the legitimate state interest in avoiding split voting precincts justified a total population deviation of 19 persons (0.003%) from the ideal. *Id.*; App. at 12a. The court also declined to acknowledge the other state interests identified by Defendants as justification for the population deviation in Act 1, explaining that "since the focus of our inquiry in the justification phase is population deviation, the only justification submitted which deals with that issue is the policy objective of limiting voter precinct splits." *Id.* at 677 n.4; App. at 11a. The court concluded that "Defendants have failed to provide any legitimate justification for the population deviations contained in Act 1." *Id.* at 678; App. at 14a. Judge Yohn disagreed with this portion of the majority opinion. *Id.* at 679; App. at 18a; *see also infra.*

Having found the Act 1 plan unconstitutional, the court enjoined its implementation. *Id.* at 679; App. at 16a-17a. Noting the "primary jurisdiction" of the State legislature over congressional redistricting and the lack of record evidence even suggesting that the General Assembly

would be unable to enact a new redistricting plan in time for the 2002 elections, the court ordered: "The Pennsylvania General Assembly shall, within three weeks of the date of this order, prepare, enact and submit for review and final approval by this Court, a congressional redistricting plan in conformity with this opinion." *Id.* at 678, 679; App. at 14a-15a, 17a. Judge Yohn, although dissenting from the ultimate finding of unconstitutionality, agreed that if the Act 1 plan was unconstitutional, allowing the legislature a reasonable opportunity to correct any deficiency was appropriate. *Id.* at 679; App. at 18a.

In his dissent, Judge Yohn concluded that defendants had met their minimal burden to justify the miniscule population deviation. *Id.*; App. at 18a. Judge Yohn determined that the evidence supported Defendants' justification that the deviation was attributable to a desire to avoid split precincts. *Id.* at 680; App at 20a. In addition, Judge Yohn explained why the majority was wrong to rely on Plaintiffs' Alternative Plan 4 to shift the burden:

> Plaintiffs produced a map that was 'zeroed out' without splitting any voting precincts, Alternative Four. However, this plan does not follow the general contours of Act 1. The [Supreme] Court has oftentimes reminded us of the necessity not to override state goals, policies and preferences any more than is necessary. There is no evidence to support a conclusion that Alternative Four encompasses the many other state goals, policies and preferences inherent in Act 1 which resulted in its enactment.

Id. at 680-81; App. at 21a-22a (internal citations omitted). Judge Yohn would have upheld Act 1.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents substantial and important questions concerning the validity and application of the legal standards used to assess alleged violations of the one-person, one-vote principle and the authority of a federal court to order a state legislature to enact law and to assume a power of review and approval over such law.

A. *De Minimis* Deviation

In *Wesberry v. Sanders*, 376 U.S. 1 (1964), this Court held the principle of one-person, one-vote applicable to congressional reapportionment pursuant to U.S. CONST. art. I, §2 and established a standard requiring that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 8.

In elucidating the *Wesberry* standard in *Kirkpatrick v. Priesler*, 394 U.S. 526, 530 (1969), this Court declined to establish a "fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard." Instead, it explained that "the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance no matter how small." *Id.* at 530-31 (citation omitted). Justice Fortas wrote separately to emphasize his disapproval of the "standard of near perfection" announced in *Kirkpatrick*, predicting that "[t]o carry out this theoretical possibility [] a legislature might have to ignore the boundaries of common sense" and noting that "[n]o purpose is served by an insistence on precision which is unattainable because of the inherent

imprecisions in the population data on which districting must be based." *Id.* at 538, 539 (Fortas, J., concurring).

Thirteen years later in *Karcher*, this Court revisited the issue of *de minimis* deviation when it addressed the question of "whether an apportionment plan for congressional districts satisfies Art. I, §2, of the Constitution without need for further justification if the population of the largest district is less than one percent greater than the population of the smallest district." 462 U.S. at 727. The challenged congressional redistricting plan had a total population deviation of 0.6984%. This Court again declined to establish a *de minimis* threshold. *See id.* at 733-34.

However, Justice White (joined by Chief Justice Burger, Justice Powell and then-Justice Rehnquist) dissented, refusing to approve "the Court's unreasonable insistence on an unattainable perfection in the equalizing of congressional districts." 462 U.S. at 766 (White, J., dissenting). The dissenting Justices stressed that "[o]ne must suspend credulity to believe that the Court's draconian response to a trifling 0.6984% maximum deviation promotes 'fair and effective representation'" and urged that *Wesberry* be understood in light of the malapportionment existing in the States at the time. *Id.* They identified the effect of the Court's standard, noting that the absence of a *de minimis* threshold only "invites further litigation of virtually every congressional redistricting plan in the Nation," because "[w]ith the assistance of computers, there will generally be a plan with an even more minimal deviation from the mathematical ideal." *Id.* at 772-73. They also highlighted the tension between the burden borne by a state legislature under the majority's standard and prior precedent respecting the realities of the legislative process and promoting deference to legitimate state goals:

> The only way a legislature or bipartisan commission can hope to avoid litigation will be to dismiss all other legitimate concerns and opt automatically for the districting plan with the smallest deviation. ... No effort is expended [by the majority] to show that Art. I, §2's requirement that Congressman be elected 'by the people' demands the invalidation of population deviations at this level. Any such absolute requirement, if it did exist, would be irreconcilable with the Court's recognition of certain justifications for population variances. Given no express constitutional basis for the Court's holding, and no showing that the objectives of fair representation are compromised by these minimal disparities, the normal course would be to uphold the actions of the legislature in fulfilling its constitutionally delegated responsibility to prescribe the manner of holding elections for Senators and Representatives. Art. I, §4. Doing so would be in keeping with the Court's oft-expressed recognition that apportionment is primarily a matter for legislative judgment.

Id. at 774-75. The dissenters predicted that the majority-approved "sterile and mechanistic application," of the standard will "only bring[] the principle of one-person, one-vote into disrepute." *Id.* at 774.

This case is a prime example of the potential for "disrepute" that a sterile and mechanistic application engenders. Here, the three-judge court invalidated a congressional redistricting plan with a total deviation of 19 persons or 0.003%. Relying on precedent of this Court, the court refused to recognize a *de minimis* threshold for which a State need not justify the deviation. This Court, however,

has never ruled on a statistical deviation essentially indistinguishable from zero. Even in *Karcher*, where the four dissenters chastised the majority, the total deviation was 3,674 persons or 0.6984%. *See* 462 U.S. at 728. This appeal presents the Court with the opportunity to address whether a State must justify a population deviation of 0.003% and to clarify the legal standard applicable to alleged violations of the one-person, one-vote principle as it coexists with the Court's long-standing recognition that congressional redistricting is inherently a political process. *See e.g., White v. Weiser*, 412 U.S. 783 (1973); *Upham v. Seamon*, 456 U.S. 37 (1982).

Even if this Court were disinclined to modify the *Karcher* standard, it must be recognized that the decision of the three-judge court below essentially does so. In *Karcher*, this Court held that minor population deviations can be justified on a minimal showing. *See* 462 U.S. at 741. The acceptance by the court below of an abstract zero-deviation plan and its rejection of the Defendants' proffered justifications in light of that plan ensures that it will be practically impossible for any plan to pass constitutional muster unless absolute "zero" deviation is attained. The *Karcher* standard, while strict, does not require every congressional redistricting plan to achieve a deviation of zero unless justified. If it did, the second prong of the test would be superfluous. A reversal on this basis alone is warranted to clarify the appropriate standard for a one-person, one-vote challenge.

B. Plaintiffs' Burden Under the First Prong of the *Karcher* Test

The three-judge court concluded that Plaintiffs met their burden under the first prong of *Karcher*, which requires courts to consider whether the population

differences among districts "could have been reduced or eliminated altogether by a 'good-faith effort to draw districts of equal population.'" 195 F.Supp.2d at 675 (quoting *Karcher*, 462 U.S. at 730); App. at 7a. The court reached this conclusion on the basis of an abstract, hypothetical plan adduced by Plaintiffs. This plan was not considered by the state legislature and there is no record evidence that it would have had a chance of passage if it had been. As predicted by the dissenting Justices in *Karcher*, modern computer technology permits the creation of a multitude of plans with zero deviation. However, in the abstract, any such plan is no more than an exercise in aggregating population units. Accepting an abstract plan as meeting the first prong of *Karcher*, as was done here, reduces a plaintiff's burden to a simple exercise in transferring the results of long division onto a map.

A review of *Karcher* and subsequent lower court decisions interpreting it reveals no instance where an abstract zero deviation plan was sufficient in itself to satisfy the first prong of the test. Plaintiffs in those cases demonstrated either that a plan before the legislature had a lower population deviation than the enacted plan or that the proffered zero-deviation plan is itself a good-faith, feasible proposal with a realistic chance of enactment – i.e., that it tracks the constitutionally permissible political goals of the legislature as much as possible while obtaining zero deviation. In *Karcher*, this Court noted that "several other plans introduced in the 200th Legislature had smaller maximum deviations than the [enacted] Feldman Plan." 462 U.S. at 738. In response to an objection that "the alternative plans considered by the District Court [i.e., the other plans before the Legislature] were not comparable to the Feldman Plan because their political characters differed profoundly," this Court responded:

> We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time. Nevertheless, the claim that political considerations require population differences among congressional districts belongs more properly to the second level of judicial inquiry in these cases, ... in which the State bears the burden of justifying the differences with particularity.
>
> In any event, it was unnecessary for the District Court to rest its finding on the existence of alternative plans with radically different political effects. As in *Kirkpatrick*, 'resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality.' 394 U.S. [] at 532. Starting with the Feldman Plan itself and the census data available to the legislature at the time it was enacted, ... one can reduce the maximum population deviation of the plan merely by shifting a handful of municipalities from one district to another.... Thus the District Court did not err in finding that the plaintiffs had met their burden of showing that the Feldman Plan did not come as nearly as practicable to population equality.

Id. at 739-740

In *Anne Arundel County Republican Central Committee v. State Advisory Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992), the three-judge court (which ultimately found the deviation justified and upheld the constitutionality of the plan under review) summarily concluded that because there was a plan before the legislature "with a smaller numerical deviation from absolute equality [total deviation of 10 people], plaintiffs have proved that [the enacted plan's] deviations did not result from an unavoidable good faith effort to achieve population equality." *Id.* at 396.[6]

Applying *Karcher* to require a plaintiff to do more than just offer a *tabula rasa* plan will simultaneously promote legislative attention to constitutional goals and discourage the extra-legislative creation of abstract plans for use as a wedge to open the courtroom door to litigation by political opponents. It will also assure that, if a case arises in which private plaintiffs genuinely care about population deviation rather than about partisan politics, they can obtain a remedy to meet their stated interests, without dragging the courts into political debate. The present appeal offers this Court the opportunity to clarify plaintiffs' burden under the first prong of *Karcher* as it

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[6] *See also Stone v. Hechler*, 782 F. Supp. 1116, 1126 (W.D. W.Va. 1992) ("Under *Karcher*, plaintiffs satisfy their burden under the first prong if they demonstrate that the population deviations among the congressional districts under West Va. Code §1-2-3 [the duly-enacted plan] could have been reduced or eliminated *by the adoption of a different plan that was before the Legislature when it enacted West Va. Code §1-2-3*. Because seventeen other plans with a lower overall variance were before the Legislature during its regular and special session, the Court concludes that Stone has satisfied his burden") (emphasis added).

coexists with long-standing precedent recognizing that redistricting is inherently a legislative process.

C. Justification Under Prong Two of *Karcher*

Under the second prong of the *Karcher* test (reached only if the plaintiff meets the burden under the first prong), a defendant must prove "that each significant variance between districts was necessary to achieve some legitimate goal." 462 U.S. at 731. This Court has explained that it will defer to state legislative policies, even if they result in a deviation from the one-person, one-vote standard –

> so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts. See 412 U.S. at 795-797; cf. Upham v. Seamon, 456 U.S. 37 (1982); Connor v. Finch, 431 U.S. 407, 414-415 (1977). Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory, see Gomillion v. Lightfoot, 364 U.S. 339 (1960), these are all legitimate objectives that on a proper showing could justify minor population deviations.

Karcher, 462 U.S. at 740.

In *Anne Arundel County*, on a record similar to the present case, a three-judge court concluded that the State had justified the 10-person total deviation (0.002%):

> [T]he State has set forth several convincing, consistent, and legitimate justifications for the numerical deviations within H.B. 10. These include: (1) keeping intact the three major regions that surround the center of the state ..., (2) creating a minority voting district, and (3) recognizing incumbent representation with its attendant seniority, in the House of Representatives. ... We conclude that these justifications, which the State alleges are properly within the ambit of a state legislature's redistricting latitude and designed to achieve legitimate state goals, are sufficient to warrant the very small numerical variance among the congressional districts seen here. The analysis mandated by the Supreme Court cases applying Art. I, §2 is, therefore, satisfied.

781 F. Supp. at 387. This Court affirmed. *See* 504 U.S. 938.

Here, the three-judge court concluded (Judge Yohn dissenting) that Defendants failed to justify the 19-person deviation. It rejected as "pretext" Defendants' justification of minimizing the number of split precincts and ignored the other justifications inherent in the Act and its legislative history because they did not deal with the issue of population deviation. 195 F.Supp.2d. at 677 & n.4; App. 11a-12a. Instead, the court evaluated whether the plan paid attention to the examples of legislative policies this Court noted in *Karcher* would justify minor deviations and determined that it did far worse on these legislative policies

than any other plan before the court. *Id.* at 678; App. at 13a.

Permitting such an approach is inconsistent with *Karcher*, would render the second prong of *Karcher* meaningless and would make it virtually impossible for any legislatively-enacted plan to survive scrutiny. This appeal offers an opportunity for the Court to clarify the application of the justification prong so as to enable state legislatures to better perform their constitutional responsibility.

1. Split precincts

While the three-judge court "acknowledge[d] that the desire to avoid splitting precincts is a legitimate state interest which could justify a nineteen person deviation," it rejected it as a justification because "the evidence has demonstrated that it is possible to draw a congressional district map with zero deviation and no precinct splits." 195 F.Supp.2d at 677; App. at 11a-12a. In so doing the court, in effect, eliminated the second prong of *Karcher*. If a legitimate justification can be labeled "pretext" because it is possible to draw a zero deviation map that splits no voting precincts, then there can be no justification of a plan that will not be deemed pretext when a hypothetical "zeroed out" plan is presented.

Moreover, where a duly-enacted congressional redistricting plan is under attack solely on the basis of a minuscule deviation from zero population, then a legitimate justification cannot be rejected just because a totally different plan could be drawn that would achieve zero deviation without any precinct splits. To permit such ignores the reality of the political process, with its implicit compromises, that this Court has stressed is the preferred (and the constitutionally mandated) means of creating congressional districts. *See e.g., Gaffney v. Cummings*,

412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment.").

The question of whether an acknowledged legitimate state policy – minimizing precinct splits – can be termed "pretext" and disregarded as justification for a miniscule population deviation is a significant and important issue for the state legislatures that are responsible for congressional redistricting. At least once every decade, they must evaluate the constitutionality of the districts in terms of compliance with the constitutional requirement of one-person, one-vote. Typically, adjustments are required. In redrawing the districts, state legislatures must make policy decisions and reach compromises. If those choices are constitutional, then they should be considered as a justification, not as a pretext. In this case the court essentially treated any potential justification as a pretext. State legislatures need to know whether legitimate state policy will be recognized as a justification for a minuscule deviation resulting from the political process of achieving agreement on a congressional redistricting plan.

2. Other justifications

Defendants identified, and supported with reference to testimony and the legislative history, three other legitimate justifications: (1) the maintenance of two majority-minority districts (Districts 1 & 2 in Philadelphia County); (2) protection of the senior member of Pennsylvania's congressional delegation (Congressman Murtha in District 12), and (3) creation of an open seat in acknowledgment of the population growth in a particular part of Pennsylvania (District 6). These justifications are "consistent with constitutional norms" and should have

been considered by the court. The first two are similar to those accepted in *Anne Arundel County*, a decision affirmed by this Court, and the third is a legitimate legislative policy. Record evidence shows they were items of importance to the General Assembly during its debates on congressional redistricting. They should have been considered as justification for the minuscule population deviation of the Act 1 plan.

Disregarding these justifications is inconsistent with the approach taken by the three-judge court in *Anne Arundel County*, where two of the justifications were specifically considered and found sufficient. These justifications also seem to be within the ambit of the "legitimate objectives" this Court offered as examples in *Karcher*. State legislatures are faced with contradictory decisions concerning the identification of "legitimate objectives" that would justify a minor population deviation. This Court should take the opportunity to clarify the assessment of the objectives that will justify minor population deviations.

D. Federal Court Authority to Order Submission of Revised Plan

Upon declaring Act 1 unconstitutional, the three-judge court ordered the Pennsylvania General Assembly to, "within three weeks of the date of this order, prepare, enact and submit for review and final approval by this Court, a congressional redistricting plan in conformity with this opinion." 195 F.Supp.2d at 679; App. at 17a. This order was both procedurally and substantively improper. Allowing it to stand would permit disrespect of a sovereign body, charged directly by the United States Constitution with the responsibility of putting in place the districts from

which representatives to Congress from the Commonwealth of Pennsylvania are to be elected.

This is not a case where the court merely gave the legislature an opportunity to act within a reasonable time, before the court itself undertook remedial proceedings. Instead, the court's order essentially set aside whatever else may have been on the legislative calendar, made responding to the court the top priority and actually mandated lawmaking in conformity with its order. Issues of federalism are raised when a federal court directs a state legislature to exercise sovereign functions. *See New York v. United States*, 505 U.S. 144 (1992) (Congress may not commandeer State's legislative processes); *id.* at 161 ("'this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations'") (quoting *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982)).

The court's order also arrogated to the three-judge federal panel a power of review and "final approval" of a state statute. Statutes are presumed valid and constitutional. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (duly-enacted revised redistricting plan presumed valid until challenged and determined otherwise). In the states, as in the federal government, once a bill is duly enacted by a legislative body and presented to and signed by the chief executive, it typically becomes law and is effective without further review and approval.[7] These

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[7] The Pennsylvania Constitution requires the President of the Senate and the Speaker of the House (Appellants in this case) to sign a bill that has passed both houses and to present it to the Governor for his approval. PA. CONST. art. III, §8; art. IV, §15. Appellants are without power under the Pennsylvania Constitution to present a bill to a federal court for its final approval.

principles should apply no less to curative legislation that follows a judicial decision declaring an earlier enactment unconstitutional. State officials should not have to bear the burden of arguing for "final approval" by the federal judiciary of a statute that has not even been challenged by a plaintiff. *See Wise, supra*; *see also Younger v. Harris*, 401 U.S. 37, 52 (1971) ("power and duty of the judiciary to declare laws unconstitutional is ... derived from its responsibility for resolving concrete disputes brought before the courts for decision").

This appeal affords the Court an opportunity to clarify the important relationship between the federal courts and the state legislatures.

CONCLUSION

This appeal involves congressional redistricting, a function that the United States Constitution places directly in the discretion of state legislatures. It provides an opportunity for this Court to provide clarity in two areas of importance and significance – application of the one-person, one-vote principle and application of federalism principles. This Court should note probable jurisdiction and proceed to address the merits of the questions presented.

Respectfully submitted,

JOHN P. KRILL, JR. *(Counsel of Record)*
LINDA J. SHOREY
JULIA M. GLENCER
COUNSEL FOR APPELLANTS

Supreme Court, U.S.
FILED
011817 JUN 10 2002
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

ROBERT C. JUBELIRER AND MATTHEW J. RYAN,
Appellants

v.

RICHARD VIETH, *et.al.*
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

APPENDIX TO JURISDICTIONAL STATEMENT

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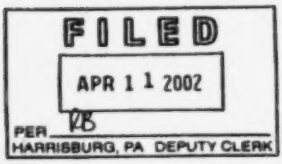
APPENDIX A



IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al.,	:	
Plaintiffs,	:	
v.	:	No. 1:CV-01-2439
	:	(Judge Rambo)
THE COMMONWEALTH	:	
PENNSYLVANIA, et al.	:	
Defendants.	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Defendants Robert C. Jubelirer and Matthew J. Ryan appeal to the Supreme Court of the United States from the order entered April 8, 2002 in this matter, which declared Act 1 of 2002 unconstitutional and permanently enjoined its implementation. The appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

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April 11, 2002

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH	:	
NORMA JEAN	:	**CIVIL NO. 1:CV-01-2439**
VIETH, and	:	
SUSAN FUREY,	:	
Plaintiffs	:	
	:	**NYGAARD, Circuit Judge**
v.	:	**YOHN, District Judge**
	:	**RAMBO, District Judge**
COMMONWEALTH	:	
OF	:	
PENNSYLVANIA,	:	
et al.,	:	
Defendants	:	

OPINION AND ORDER OF THE COURT

PER CURIAM

In our previous order of February 22, 2002, we dismissed several claims brought by the Plaintiffs which challenged the constitutionality of Pennsylvania Senate Bill 1200 (Act 1), the congressional redistricting plan enacted by the General Assembly and signed into law on January 7, 2002. On March 11-12, 2002, we held a hearing on the Plaintiff's sole remaining claim: Act 1 violates the constitutional principle of "one-person, one vote." Upon conclusion of this hearing, we ordered the

parties to file proposed findings of fact and conclusions of law.

I. Background

The 2000 Census reported that Pennsylvania's total population was 12,291,054 persons. As a result of this population figure, and in accordance with Article I, Section 2 and the Fourteenth Amendment to the United States Constitution, Pennsylvania's congressional delegation was reduced from twenty-one to nineteen representatives in Congress.[1]

The loss of two congressional seats made it necessary to increase the size of the existing districts by approximately 100,000 persons. Additionally, because of shifts in population, some congressional districts were over-populated while some were well under the ideal population. Therefore, significant changes were made to the existing congressional districts.

Pennsylvania Senate Bill 1200 was introduced by Senators Brightbill and Lemmond on November 16, 2001. Senators Brightbill and Lemmond are members of the

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[1] Article I, Section 2 states in pertinent part: "The House of Representatives shall be composed of Members chosen every second year by the People of the several States, and the Electors of each State shall have Qualification requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art I, § 2. Section 2 of the Fourteenth Amendment states in pertinent part: "Representatives shall be apportioned among the several states according to their representative numbers, counting the whole number of persons in each state." U.S. Const. amend. XIV, §2.

Republican Party. A competing plan, Senate Bill 1241 was introduced by Democratic state senators Mellow, O'Pake, Wagner, Musto, Kasunic, Fumo and Stout. On December 10, 2001, the Senate considered amendments to Senate Bill 1200. A Republican amendment was ultimately agreed to. The version of Senate Bill 1200 that eventually passed the Senate contained a population deviation of twenty-four persons.

After an amendment by the Pennsylvania House of Representatives, that chamber passed Senate Bill 1200 on December 12, 2001. The version of Senate Bill 1200 that passed the House had a total population deviation of nineteen persons.[2] It also maintained two minority-majority districts in the Philadelphia area, created one open seat in the southeastern part of the Commonwealth and paired two Democratic incumbents in the same district. One Democratic incumbent was paired against one Republican incumbent.

The Senate refused to concur in the amendments to Senate Bill 1200 offered by the House of Representatives. A Conference Committee was appointed and a plan was eventually devised that contained a nineteen person deviation. This Conference Committee Report on Senate Bill 1200 was passed by the Senate on January 3, 2002 and by the House of Representatives later the same day. It was signed into law on January 7, 2002.

In its final form, Act 1 created nineteen congressional districts with a total population deviation of

---

[2] The term "deviation" as used in this opinion refers to the differences in population between the least and most populated districts under the redistricting plan.

nineteen. Although Act 1 did maintain two "minority-majority" districts in Philadelphia, it created three districts in which six incumbent congressman would have to run for re-election against each other. Of these pairings, two of the districts required Democratic congressmen to run against each other and one district required an incumbent Democratic representative to run against an incumbent Republican representative. These pairings of incumbent congressman permitted the creation of an open congressional district in the southeastern part of the Commonwealth. In contrast to its treatment of Democratic incumbents, no Republican congressmen are forced to run against each other.

Moreover, Act 1 splits eighty-four local governments, including twenty-five counties, fifty-nine cities, boroughs or townships, as well as forty-one wards. It also splits six voting precincts.

II. Analysis

A. Population Deviation

The United States Constitution requires that each congressional district in a state contain equal population. See *Wesberry v. Sanders*, 376 U.S. 1, 18, 84 S.Ct. 526 (1864) (holding that Art. I, § 2 of the Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."). The Supreme Court has been exceedingly clear in requiring lower courts to balance population among the districts with precision. See *Karcher v. Daggett*, 462 U.S. 725, 734, 103 S.Ct. 2653 (1983) ("there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet

the standard of Art. I, § 2 without justification.'); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531, 89 S.Ct. 1225 (1969) ("[T]he `as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small."). In a challenge to a congressional redistricting plan, the plaintiff bears the burden of proving that the differences in district-to-district population could have been reduced or eliminated altogether by a "good-faith effort to draw districts of equal population." *Karcher*, 462 U.S. at 730.

We find that the Plaintiffs have met their burden in this case. First, it is undisputed that Act 1 has a deviation in population of nineteen persons between the most populated and least populated districts. Therefore, unless these deviations were unavoidable or resulted despite a good faith effort to draw districts of equal population, then the Defendants must prove a legitimate justification for the deviations. The evidence conclusively demonstrates that this population deviation was avoidable. Plaintiffs presented into evidence "Alternative Plan 4" which had a minimum possible deviation - districts that differ by only one person. Additionally, this plan achieves zero deviation without splitting any precincts among congressional districts and splits fewer municipalities than Act 1. Witnesses presented by both parties testified that it would have been relatively easy to take any plan or map and reach a point of zero population deviation.[3] Indeed, the Defendants themselves submitted

---

[3] The Defendants suggest that "Alternative Plan 4" cannot be considered because it was never before the

a map with zero population deviation. Thus, the nineteen person deviation in Act 1 was avoidable.

---

legislature. They argue that Plaintiffs must meet their burden under the first prong of the *Karcher* test only by relying on maps and/or redistricting plans that have a lower population deviation than the one enacted and that were presented to the legislature. We disagree. Although in *Karcher*, the legislature had before it other plans with less deviation, the Court never endorsed such a requirement. Instead, the Court focused on whether a plan with less deviation was possible. In this case, the Plaintiffs have provided four plans that had less deviations than Act 1. If we were to adopt the limited analysis suggested by the Defendants, we would be adopting a view that would isolate grossly disproportionate plans from constitutional scrutiny on the sole basis that such plans constitute the plan with the least deviations *available*. *Karcher* is wrought with references indicating that the least deviation *possible* is that which should govern the analysis. *See* 462 U.S. at 727 (affirming the three-judge panel's conclusion that the New Jersey plan violated the one-person, one-vote requirement "because the population deviations among districts, although small, were not the result of good-faith effort to achieve *population equality*) (emphasis added); 462 U.S. at 73233 (stating that the Court requires that "*absolute population equality* be the paramount objective of apportionment ... in the case of congressional districts," but not necessarily for other forms of redistricting) (emphasis added); 462 U.S. at 730 (stating that under the first prong of the analysis "the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of *equal population*") (emphasis added); 462 at 731 ("Adopting any standard other than *population equality*, using the best census data available ... would subtly erode the Constitution's meal of *equal representation*.") (emphasis added). In this case, the evidence indicates that a zero-deviation map was possible, and thus should govern our analysis under *Karcher's* first prong.

Nor can the deviation contained in Act 1 be excused based upon the good faith of the Defendants. Indeed, we find that the testimony of defense witness Dr. John Memmi satisfies the Plaintiff's burden here. Dr. Memmi testified that he was in charge of drawing up the map that became Act 1. He further stated that he drew the map under the direct supervision of the Republican leadership. He began manipulating the map in order to get the deviations lower. However, once he reached the point of a nineteen-person deviation, he was told to stop manipulating the map:

> Q: Actually, what I would like to know is if there was a number that anybody said you could stop once you got to number nineteen or number 18?
>
> A: Every move that was made was done under the supervision of my supervisors. And at the time, the team involved the House Republican Caucus Redistricting crew, some members thereof, the Senate Republican Caucus Redistricting team, members thereof. And the Supervisors sat there while Bill Shower and I - Bill is a gentleman with the House Republican Caucus. They observed every census block move that we made. And we continued to make moves, and were monitoring the overall range. I should say we all monitored it, of course, but the supervisor s the one whose monitoring counted. And when the districts were at nineteen overall range, they said that is sufficient.

Tr. Vol 3 at page 276. No other witnesses were called by the Defendants to explain why Dr. Memmi was told to stop manipulating the map.

We find this testimony to be in clear violation of the Supreme Court's express goal of getting as close as possible to zero deviation when drawing congressional districts. *See Karcher*, 462 U.S. at 734, 103 S.Ct. at 2660. Therefore, we find that the Defendants did not put forth a good-faith effort to draw districts of equal population.

It has been suggested that the deviation from absolute numerical equality present in Act 1 is too trivial or minute to rise to a constitutionally significant level. While it is true that the deviation contained in Act 1 is small, *Karcher* specifically holds that "there are no *de minimis* variations which could practically be avoided, but nonetheless meet the standard of Art. I, § 2 without justification." 462 U.S. at 734, 103 S.Ct. 2660. Thus, we hold that the population deviation in Act 1, even though relatively small, enables the Plaintiffs to satisfy *Karcher's* first prong and shifts to the Defendants the burden of proving justification.

B. Justification

Because the Plaintiffs have met their burden under *Karcher*, the Defendants must now prove that this population deviation was "necessary to achieve some legitimate goal." 462 U.S. at 731, 103 S.Ct. at 2658 (*citing Kirkpatrick*, 394 U.S. at 530, 89 S.Ct. at 1228; *Swann v. Adams*, 385 U.S. 440, 443-444, 87 S.Ct. 569, 571-72 (1967)). While *Karcher* did not specify how the State might meet its burden in step two, it did give several

examples of legislative policies that might justify some variance among the populations of the State's various congressional districts. Specifically, the Court stated that "making districts compact, respecting municipal boundaries, preserving the cores of prior districts and avoiding contests between incumbent Representatives" may legitimate minor population deviations among congressional districts. The Court also made clear that the burden borne by the State varies inversely with the magnitude of the population deviation. Id. at 741, 103 S.Ct. 2664. That is, the greater the deviation, the more compelling the government's justification must be.

Defendants contend that the population variances in Act 1 are justified by a desire to avoid splitting voting precincts.[4] Both parties agree that splitting precincts creates additional costs and work for county election officials in acquiring voting machines, in customizing ballots, in training precincts officials, in registering voters and in counting ballots. Moreover, we recognize that split precincts increase the potential for voter disorientation and candidate confusion. Therefore, to the extent that such justification is genuine, we acknowledge that the desire to avoid splitting precincts is a legitimate state interest which could justify a nineteen person deviation.

We find, however, that the Defendants' arguments on this point are a mere pretext. Specifically, the

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[4] While the Defendants have suggested various other state interests which may have justified Act l, since the focus of our inquiry in the justification phase is population deviation, the only justification submitted which deals with that issue is the policy objective of limiting voter precinct splits. Therefore, we will confine our analysis to this issue.

evidence has demonstrated that it is possible to draw a congressional district map with zero deviation and no precinct splits. Plaintiffs' witness, Robert Priest, drew exactly such a map using the same tools as Dr. Memmi. However, unlike Dr. Memmi, Mr. Priest was free to draw the map by manipulating entire precincts from district-to-district in order to achieve absolute population equality. As we have previously pointed out, Dr. Memmi testified that he was more constrained by his superiors. According to that testimony, Dr. Memmi initially formulated three congressional districts of ideal population by manipulating entire precincts. However, at that point, he was instructed to stop using whole precincts and to begin using census blocks to lower the deviation. Because every voting precinct contains several census blocks, manipulation of the census blocks leads almost inextricably to splitting precincts. We also note that none of the congressional districts that have split precincts have an ideal population.

Dr. Memmi was equally restrained in his efforts to bring Act 1 down to a zero deviation. That is, his superiors in the Republican caucus instructed him that he was only to manipulate census blocks and not precincts. This wholesale reliance on the census block method- the lone cause of the precinct splits - is what Defendants now employ to justify the deviations in their map. The logical inconsistency is so deep that it causes us to pause and consider the sincerity of such proffer. If Defendants truly wanted to avoid splitting precincts, they would have done so by enacting a zero deviation map that did not split any precincts.

Moreover, it is worth noting that of the maps presented at trial, Act 1 is that which least comports with the neutral legislative policies that the *Karcher* Court stated would justify a Congressional redistricting plan with some deviations. Act 1 is the plan which contains the least compact districts. (Pls. Ex. 12 at 7.) Act 1 splits the most counties (twenty-five) and municipalities (fifty-nine cities, townships, or boroughs).[5] (Id.) With the exception of Act 1's twin, the zero-deviation version, Act 1 even splits the most precincts. (Id.) To the extent that Act 1 retains the cores of prior districts, it does so only for districts containing Republican incumbents. (See id. at 8.)

However, it is on *Karcher's* final endorsed neutral criteria - the avoidance of contests between incumbents - that Act 1 fails most miserably. Although Pennsylvania's loss of two congressional seats requires the pairing of only two sets of incumbents in the 2002 elections, Act 1 pits six incumbents against each other: two pairs of Democrats, and one Republican against one Democrat (the latter in a district that heavily favors Republican candidates). At the same time Act 1 pits more incumbents than necessary against one another, it also creates a new district, District 6, in which no incumbent resides. In the face of such evidence, it is clear that *Karcher's* neutral criteria were not high on the priority list in enacting Act 1. The dissent suggests that our analysis should pay deference to the policies that Act 1 reflects. However, there is no legal authority to support the corollary assertion that the only relevant zero-deviation

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[5] In comparison, the now defunct 1992 Plan, which contained twenty-one congressional districts, split only eighteen counties and thirteen municipalities.

maps with no precinct splits are those which comport with the general contours of Act 1.

In summation, it has been conclusively proven that it is possible to draw a congressional district map with zero population deviation amongst districts without splitting any precincts. Therefore, Defendants cannot rely on a general desire to avoid splitting precincts as a legitimate justification for a map that splits six such precincts. Put another way, if it is possible to achieve a zero deviation map with no precinct splits by manipulating whole precincts, the actions of the Defendants in switching to census block data call into question the legitimacy of their proffered justifications. We find, therefore, that the Defendants have failed to provide any legitimate justification for the population deviations contained in Act 1. As such, we enjoin the implementation of Act 1.

III. Remedy

Having determined that Act 1 is unconstitutional, we now address the question of the appropriate remedy. The Supreme Court has cautioned that "reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *White v. Weiser*, 412 U.S. 783 (1973). We recognize that the Pennsylvania General Assembly has primary jurisdiction over congressional redistricting. Furthermore, no evidence was presented that would permit us to conclude that the General Assembly would be unable to enact a new constitutional redistricting plan

in time for the 2002 elections. This is not a case where the respective legislative bodies are hopelessly deadlocked and the likelihood is that they will be able to enact a constitutionally sound plan.

Therefore, the Defendants are ordered to submit a constitutionally sound redistricting plan that has been enacted into law by the Commonwealth of Pennsylvania to this court within three weeks of the date of this opinion.

An appropriate order will follow.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH	:	
NORMA JEAN	:	**CIVIL NO. 1:CV-01-2439**
VIETH, and	:	
SUSAN FUREY,	:	
Plaintiffs	:	
	:	**NYGAARD, Circuit Judge**
v.	:	**YOHN, District Judge**
	:	**RAMBO, District Judge**
COMMONWEALTH	:	
OF	:	
PENNSYLVANIA,	:	
et al.,	:	
Defendants	:	

ORDER

In accordance with the preceding opinion, **IT IS HEREBY ORDERED THAT:**

(1) Plaintiffs' request for declaratory judgment is **GRANTED**. Act 1 is hereby declared unconstitutional as a violation of Article I, § of the United States Constitution;

(2) Plaintiffs' request for injunctive relief is GRANTED IN PART as follows:

(A) To the extent that Plaintiffs request that the court enjoin Act 1's implementation, Plaintiffs' request is

GRANTED. Defendants are permanently enjoined from implementing Act 1;

(B) To the extent that Plaintiffs request that the court devise its own redistricting plan for use in the 2002 congressional elections, Plaintiffs' request is **deferred pending compliance by the Pennsylvania General Assembly with this order**; and instead,

(3) The Pennsylvania General Assembly shall, within three weeks of the date of this order, prepare,, enact and submit for review and final approval by this Court, a congressional redistricting plan in conformity with this opinion.

This Court shall retain jurisdiction pending issuance of a final order in this matter.

IT IS SO ORDERED.

/S/

RICHARD L. NYGAARD
United States Circuit Judge

/S/

SYLVIA H. RAMBO
United States District Judge

Dated: April 8, 2002.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH	:	
NORMA JEAN	:	**CIVIL NO. 1:CV-01-2439**
VIETH, and	:	
SUSAN FUREY,	:	
Plaintiffs	:	
	:	**NYGAARD, Circuit Judge**
v.	:	**YOHN, District Judge**
	:	**RAMBO, District Judge**
COMMONWEALTH	:	
OF	:	
PENNSYLVANIA,	:	
et al.,	:	
Defendants	:	

YOHN, DISTRICT JUDGE, DISSENTING:

I agree with majority that the plaintiffs have met the first prong of the *Karcher* test and that the appropriate remedy, if Act 1 is unconstitutional, is to give the Commonwealth of Pennsylvania a reasonable period of time to enact a constitutionally sound redistricting plan.

I respectfully dissent, however, from Section II.B. of the majority opinion and conclude that defendants have met their burden, although just barely, to establish a justification for the nineteen person maximum deviation, and that Act 1 therefore passes constitutional muster.

In *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court stated that the plaintiffs' "success in proving that the Feldman Plan was not the product of a good faith effort to achieve population equality means only that the

burden shifted to the state to prove that the population deviations in its plan were necessary to achieve some legitimate state objective." (emphasis added). 462 U.S. at 740. Thus, the focus of the second prong of the *Karcher* test is the state's justification for the population deviations in Act 1.[6]

The defendants have pointed to a litany of state interests behind Act 1; however, since the focus of our inquiry in the justification phase of the *Karcher* analysis is the population deviation, the only justification submitted which deals with that issue is the policy objective of limiting voter precinct splits. Defendants contend that Act 1 could be "zeroed-out" by using Modification One but that this would entail splitting twenty-six voting precincts rather than the split of six voting precincts in Act 1.

Both parties agree that splitting precincts creates additional costs and work for county election officials in acquiring voting machines, in customizing ballots, in training precinct officials, in registering voters and in counting ballots. In addition, it increases the potential for voter confusion and candidate confusion. Thus, the desire to minimize the splitting of voting precincts is a legitimate justification, particularly when the overall population deviation is only nineteen.

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[6] The majority correctly points out that the Court has "made clear that the burden borne by the state varies inversely with the magnitude of the population deviation. . . . That is, the greater the deviation, the more compelling the government's justification must be." It would seem therefore that a nineteen person deviation in a congressional district of 646,371 or 646,372 would require a justification on the lowest end of the "justification" scale.

The evidence with reference to this justification is, however, minimal. Dr. John Memmi testified that he was the cartographer who worked on the final draft of what became Act 1. When he reached the population deviation of nineteen he was told by his superiors that he could stop work. Inexplicably, neither party asked Dr. Memmi who told him this or called as a witness the person who told him to stop work in order to explore the basis for the decision. As a result, we are left to draw inferences from the evidence presented.

Defendants ask us to draw the inference that the effort to equalize population was halted because of a desire not to split any more voting precincts. There are 9,427 voting precincts in Pennsylvania but there are 322,424 census blocks. Act 1 as enacted contained six voting precinct splits. (Defendants' exhibit 92). Subsequent to the enactment of Act 1 Dr. Memmi made further adjustments of census blocks in order to produce a plan with a zero population deviation. Using census blocks inevitably leads to more voter precinct splits and the resulting plan, designated as Modification One contains twenty-six voting precinct splits. (Defendants' exhibit 90).

This inference is also supported by the testimony of Dr. Memmi concerning the conversation when he was working on the last draft of what became Act 1 and told that he could stop work.

> "Q Did they tell you why they thought that was sufficient?
>
> A They did not specifically say John, Bill, these are the reasons why we are stopping at 19. I don't mean to be curt.

> One of the prevailing themes throughout the exercise was to minimize the number of precinct incursions. We were at six. I worked with individuals who understand the election process. They understand the administration at the county level.
>
> I do not profess to have any more than at best a superficial understanding of that. But the concern was to minimize the number of precinct incursions so that election administration would be as smooth as it could be."

R. at 320 - 21.

Finally, I note that neither party has, even with the benefit of hindsight, submitted a plan following the general contours of Act 1 which does not involve the splitting of more than six voting precincts. Thus, I find that the inference defendants suggest, that the justification for Act 1 is the reduced number of voting precinct splits, is reasonable.

Plaintiffs, on the other hand, ask us to infer that the Act 1 plan was not "zeroed out" because of partisan considerations. Plaintiffs produced a map that was "zeroed out" without splitting any voting precincts, Alternative Four. However, this plan does not follow the general contours of Act 1. The Court has oftentimes reminded us of the necessity not to override state goals, policies and preferences any more than is necessary. *See Abrams v. Johnson*, 521 U.S. 74, 101 (1997); *Upham v. Seaman*, 456 U.S. 37, 41 - 42 (1982); *White v. Weiser*, 412 U.S. 783, 795 (1973). There is no evidence to support a conclusion that Alternative Four encompasses the many other state goals, policies and preferences

inherent in Act 1 which resulted in its enactment. In addition, plaintiffs have suggested no connection between the nineteen person deviation in Act 1 and the alleged partisanship of the plan. Indeed, any such suggestion is contradicted by Dr. Memmi's specific testimony that when he was trying to reduce the plan to the minimal population deviation possible on December 31, 2001, nobody expressed any concern that continuing to trade whole precincts might change the political characteristics of some of the districts and that during the entire procedure there was no commentary of a political nature. R. at 322. Moreover, to the extent that the plaintiffs are arguing partisan gerrymandering, the *Karcher* Court noted that "beyond requiring states to justify population deviations with explicit, precise reasons, which might be expected to have some inhibitory effect, Kirkpatrick does little to prevent what is known as gerrymandering .... Kirkpatrick's object, achieving population equality, is far less ambitious than what would be required to address gerrymandering on a constitutional level." *Karcher*, 462 U.S. at 734 n. 6. Thus, the inference which the plaintiffs ask us to draw is not supported by the evidence, by reason, or by law.

I conclude, therefore, that the nineteen person deviation was justified by the "legitimate state objective" of avoiding further splitting of voter precincts and that there has been no proof that the population deviation of nineteen persons bore any relationship to the alleged partisanship of Act 1. Thus, Act 1 is not unconstitutional.

/S/
William H. Yohn, Jr. Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH,	**:CIVIL NO.1:CV-01-2439**
NORMA JEAN VIETH,	**:**
and SUSAN FUREY,	**:**
Plaintiffs	**:**
v.	**:**
COMMONWEALTH OF	**:**
PENNSYLVANIA, et al.	**:**
Defendants	**:**

ORDER

In accordance with the accompanying memorandum of law, **IT IS HEREBY ORDERED THAT:**

(1) Defendant Executive Officers' motion to dismiss pursuant to Rule 12(b)(1) is **GRANTED IN PART** and **DENIED IN PART**, as follows:

> (A) As to Defendant Commonwealth of Pennsylvania, the motion is **GRANTED**, all claims against the Commonwealth are dismissed;
>
> (B) In all other respects, the motion is **DENIED;**

(2) Defendant Presiding Officers' motion to dismiss pursuant to Rule 12(b)(1) is **DENIED;**

(3) Defendant Executive Officers' motion to dismiss pursuant to Rule 12(b)(6) is **GRANTED IN PART** and **DENIED IN PART**, as follows:

> (A) The motion is **GRANTED** as to Counts II, III, IV and V of the amended complaint;
>
> (B) The motion is **DENIED** as to Count I of the amended complaint;

(4) Defendant Presiding Officers' motion to dismiss pursuant to Rule12(b)(6) is **GRANTED IN PART** and **DENIED IN PART**, as follows:

> (A) The motion is **GRANTED** as to Counts II, III, IV and V of the amended complaint;
>
> (B) The motion is **DENIED** as to Count I of the amended complaint.

/S/ Richard L. Nygaard
RICHARD L. NYGAARD
United States Circuit Judge

/S/ William H. Yohn, Jr.
WILLIAM H. YOHN, JR.
United States District Judge

/S/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: February 22, 2002.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY, Plaintiffs,	)	
v.	)	NO. 3:CV-01-2439
THE COMMONWEALTH OF PENNSYLVANIA; MARK S. SCHWEIKER, in his official capacity as Secretary of the Commonwealth of Pennsylvania; KIM PIZZINGRILLI, in her official capacity as Secretary of the Commonwealth of Pennsylvania; RICHARD FILLING, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State; ROBERT C. JUBELIRER, in his official capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate; MATTHEW J. RYAN, in his official capacity as Speaker of the Pennsylvania House of Representatives, Defendants.	)	JUDGE RAMBO
	)	FILED SCRANTON JAN 11 2002
	)	PER DEPUTY CLERK

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. The plaintiffs have brought this action to enforce voting rights guaranteed to them by the United States Constitution. As registered Democrats and voters in the Commonwealth of Pennsylvania, the plaintiffs have exercised, and wish to continue exercising, their right to vote for their preferred candidates for United States Representative, both in general elections and in Democratic Party primary elections. The congressional districting plan that the Pennsylvania General Assembly imposed on the Commonwealth on January 3, 2002, however, violates plaintiffs' rights under the United States Constitution.

PARTIES

2. Plaintiff Richard Vieth is a registered Democrat and under the new districting plans resides in District 16. He resides at 632 Laurel Lane, Lancaster, Pennsylvania 17601.

3. Plaintiff Norma Jean Vieth is a registered Democrat and under the new districting plans resides in District 16. She resides at 632 Laurel Lane, Lancaster, Pennsylvania 17601.

4. Plaintiff Susan Furey is a registered Democrat and a resident of Montgomery County. She resides at 507 Bryn Mawr Avenue, Bala Cynwyd, Pennsylvania, 19004. Under the districting plan established in 1992, Furey resided in District 13. Under the new districting plan, Furey resides in District 6, which is overpopulated and non-compact.

5. Defendants are the Commonwealth of Pennsylvania and officials thereof who have duties and responsibilities under the laws of the Commonwealth to redraw congressional districts in Pennsylvania following the release of population data from each federal decennial census and then to conduct elections in those districts. Defendant Mark S. Schweiker is the Governor of Pennsylvania. Defendant Kim Pizzingrilli is the Secretary of the Commonwealth and oversees Pennsylvania's electoral process. Defendant Richard Filling is the Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State, which is charged with administering functions related to Pennsylvania's electoral process. Defendant Robert C. Jubelirer is the Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate. Defendant Matthew J. Ryan is the Speaker of the Pennsylvania House of Representatives.

JURISDICTION AND VENUE

6. This Court has exclusive jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), 1357, 2201, 2202, and 2284. Venue is proper in this district under 28 U.S.C. § 1391(b).

RELEVANT STATE AND FEDERALCONSTITUTIONAL PROVISIONS

7. Section 2 of Article I of the United States Constitution, as amended by Section 2 of the Fourteenth Amendment, provides, in part, that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States" and that "Representatives shall be apportioned among the

several States according to their respective numbers, counting the whole number of persons in each State...."

8. Section 4 of Article I of the United States Constitution grants limited authority to the Legislature of each State to determine "[t]he Times, Places and Manner of holding elections for ... Representatives." As the Supreme Court of the United States has recognized, State Legislatures are more limited in their authority to draw congressional districts than they are under their inherent power to draw their own state legislative districts.

9. In the First Amendment to the Bill of Rights, the United States Constitution protects the rights of freedom of speech and association.

10. The Equal Protection Clause of Section 1 of the Fourteenth Amendment prohibits any State from "deny[ing] to any person within its jurisdiction the equal protection of the laws."

11. The Privileges and Immunities Clause of Section 1 of the Fourteenth Amendment prohibits any State from "abridg[ing] the privileges or immunities of citizens of the United States."

12. Together these constitutional provisions embody fundamental guarantees that every citizen, regardless of race or political party, will have a fair and equal opportunity to cast a meaningful ballot for members of Congress and a fair and meaningful opportunity to be represented by a person of their choice in the United States Congress. These guarantees include, among other things, the one-person, one-vote principle - requiring each of a State's congressional districts to contain the same number of persons, absent a legitimate justification - and

the prohibition against invidious partisan gerrymanders, which operate to consistently degrade the votes of a particular disfavored group.

THE 1992 CONGRESSIONAL PLAN AND THE 2000 CENSUS

13. In March 1992, the Supreme Court of Pennsylvania ordered into effect a congressional districting plan establishing Pennsylvania's 21 current congressional districts. Although that plan did not achieve perfect population equality among the districts, the Supreme Court ruled that slight deviations in population can be justified when the deviations are necessary to protect other important districting interests such as the preservation of local municipal boundaries. The plan that the Supreme Court ordered into effect split 27 localities (including 19 counties and 8 cities, towns, and boroughs) and 3 election precincts; the Supreme Court rejected a competing plan that had a smaller population deviation on the grounds that it split 48 localities (including 21 counties and 27 cities, towns, and boroughs) and 22 election precincts. *See Mellow v. Mitchell,* 607 A.2d 204 (Pa. 1992). The Pennsylvania Supreme Court also found that the plan they adopted was fair to both major political parties.

14. After the Supreme Court ordered the 1992 plan into effect, a three judge federal court reviewed its validity. The three judge court ruled that the Pennsylvania Supreme Court's plan was valid, and in interpreting *Mellow v. Mitchell,* 607 A.2d 204 (Pa. 1992), recognized that, "the Pennsylvania Supreme Court identified in its opinion the avoidance of municipal splits as an important public policy of the Commonwealth." The Court wrote, "This conclusion is a matter of

Pennsylvania state law and we are bound by it." *Nerch v. Mitchell,* No. 92-0095, slip op. at 32 - 33 (M.D. Pa. Aug. 13, 1992) (per curiam).

15. Under the 1992 Plan, which was used for the most recent congressional elections in November 2000, citizens of the Commonwealth of Pennsylvania cast almost an identical number of votes for Democratic candidates as for Republican candidates, and elected 11 Republicans and 10 Democrats to Congress.

16. The 2000 election was the last under the 1992 plan drawn by the Pennsylvania Supreme Court. On December 28, 2000, the Secretary of Commerce reported to the President of the United States the tabulation of population for each of the fifty States, including the defendant Commonwealth of Pennsylvania, as determined in the 2000 decennial census. Those population figures showed that Pennsylvania is now entitled to only 19 Representatives in Congress - a decrease of two Representatives since the 1990 census. The census data also show that Pennsylvania's resident population as of April 1, 2000, was 12,281,054 persons -- 646,371 or 646,372 persons for each of the 19 congressional districts.

17. During its regular session in 2001, the General Assembly was unable to reach agreement on a congressional redistricting plan. The State House of Representatives passed one plan and the State Senate passed a different plan. The General Assembly adjourned on December 13, 2001, at an impasse.

18. Before and after the deadlock, national Republican leaders sought to use the Pennsylvania congressional redistricting process, which was wholly controlled by the Republican General Assembly and

Republican governor, to achieve national political ends, rather than to reach a result in the interests of the people in Pennsylvania. National Republican leaders pressured Pennsylvania legislators to push for maximum partisan advantage, regardless of the cost. Karl Rove, a political advisor to President George W. Bush - who lost in Pennsylvania - asked state Republicans to favor the plan passed by the state Senate rather than the more moderate House plan. Rep. Thomas M. Davis III, a Republican of Virginia and the chairperson of the National Republican Congressional Committee, stated publicly that Pennsylvania would serve as a payback for whatever redistricting successes Democrats might have had elsewhere. "Democrats rewrote the book when they did Georgia, and we would be stupid not to reciprocate," he said. Pennsylvania "will make Georgia look like a picnic." Press accounts report that Pennsylvania House Majority Leader John Perzel also received phone calls from Republican Sen. Rick Santorum and House Speaker Dennis Hastert regarding the importance of maximizing the number of seats that would elect Republicans and thus rigging the districts against the Democratic party and the interests of Democratic voters.

THE NEW CONGRESSIONAL PLAN

19. Following the end of the General Assembly's regular session, Republicans from the House and Senate worked to reach agreement on a plan that would satisfy the interests of their Republican colleagues and the national Republican party. At all points, Democratic state legislators, including those on the Conference Committee, were shut out of this process. Democratic leaders in the House and Senate were presented, for the first time, with a final version of a proposed congressional redistricting plan

on the morning of the conference committee on January 2, 2002. The Democratic members of the Conference Committee had no input whatsoever on the final plan. The Conference Committee voted this plan out on straight party lines.

20. On January 3, 2002, the General Assembly passed the new congressional redistricting plan, Senate Bill 1200 (SB 1200). That plan, delineating 19 congressional districts to comport with reapportionment following the 2000 Census, not only fails to equalize the population of each congressional district, but also ignores all traditional redistricting criteria, including the preservation of local government boundaries, solely for the sake of partisan advantage.

21. Under SB 1200, the Commonwealth's most populated district, District 7, would have a population of 646,380. The Commonwealth's least populated districts, Districts 1, 2, and 17, would each have populations of 646,361. This creates a total population deviation of 19, which is lower than the total population deviation in the 1992 plan, but in contrast to the 1992 plan, the new plan's deviation serves no recognizable legitimate interest: rather than protecting municipal boundaries, the plan splits units of local governments throughout the state among multiple districts. SB 1200 splits 84 local governments, including 25 counties and 59 cities, boroughs, or townships, as well as 41 wards. (To avoid double counting, Philadelphia for these purposes has been treated as a county, not as both a county and a city.) Montgomery County alone is split into six different congressional districts. This is in sharp contrast with the plan drawn by the Pennsylvania Supreme Court in 1992, which recognized the importance

of preserving local government boundaries and split only 19 counties and 8 cities, townships, and boroughs.

22. SB 1200 also ignores all other traditional redistricting criteria, thus demonstrating that partisanship - and nothing else - was the rationale behind the plan. Rather than protecting communities of interest, it fractures them, substituting meandering and irregular lines through the state. District 6, for example, looms like a dragon descending on Philadelphia from the west, splitting up towns and communities throughout Montgomery and Berks Counties. District 7 is barely contiguous. District 8 includes an ungainly gash that at one point narrows to 300 yards and extends five and a half miles into Montgomery County, nearly splitting neighboring District 13 in two. District 12 snakes through several counties, leaving no fewer than 25 split cities, towns, and boroughs. Not surprisingly, the districts in SB 1200 are far less compact than those in the 1992 plan.

23. In constructing SB 1200, the General Assembly did not attempt to preserve the cores of existing districts (which minimizes voter confusion by displacing fewer voters from their current districts), protect incumbents, establish partisan balance, or advance any of the legitimate redistricting criteria recognized by the United States Supreme Court or by scholars in the field of redistricting. Rather, the General Assembly's purpose and intent in enacting SB 1200 was to maximize the representation of Republican interests and minimize the representation of Democrats, no matter what the cost. Indeed, rather than preserving the seniority and power of the Pennsylvania congressional delegation, thereby enhancing Pennsylvania's clout in Washington, the General Assembly sought to replace Democratic members

who have seniority with first-term Republicans. As Republicans in the General Assembly have explained, rigging the electoral system in favor of Republicans will advance the policy agenda of current President Bush, which they believe should be in the interests of all residents of the Commonwealth - regardless of the fact that a majority of citizens voted against President Bush.

PARTISAN IMPACT OF SB 1200

24. The partisan effects of SB 1200 are massive. As Democratic state legislators have explained, SB 1200 is a "massacre." SB 1200 ensures that the voting preferences of the residents of Pennsylvania will not be reflected in congressional elections and consistently degrades the votes of Democratic voters in the Commonwealth.

25. In terms of voter preferences, the two major political parties hold nearly equal support among Pennsylvania residents, with a slight preference for Democrats. Registered Democrats outnumber registered Republicans 3,733,739 to 3,233,171, a division between the two major parties of 53.6% to 46.4%.

26. Further, on neutral playing fields free from partisan gerrymandering, Democrats consistently perform competitively in Pennsylvania elections. In twenty-one congressional races during the 2000 elections, the aggregate vote for Democrats was 2,279,227, or 50.6%, while the aggregate vote for Republicans was 2,229,057, or 49.4% of the major parties' vote totals.

27. Democrats also received more total votes than Republicans in the five statewide races in 2000, as Democrats received 11,495,041 votes to Republicans' 11,428,698, a margin of 50.1% to 49.9%. (The vote totals

in those elections include the race for President, with Democrat Al Gore receiving 2,485,967 votes (50.6% of all votes cast) to Republican George Bush's 2,281,127 votes (46.4%); the race for Attorney General, in which incumbent Republican Mike Fisher received 2,495,253 votes (55.6% of votes for major party candidates) and Democrat Jim Eisenhower received 1,991,144 votes (44.4%); the race for Auditor-General, in which incumbent Democrat Bob Casey, Jr. received 2,651,551 votes (58.7% of votes for major party candidates) and Republican Katie True received 1,862,934 votes (41.3%); the race for State Treasurer, in which the incumbent Republican Barbara Hafer received 2,307,422 votes (51.1% of votes for major party candidates) to Democrat Catherine Knoll Baker's 2,211,471 votes (48.9%); and the race for United States Senator, in which incumbent Republican Rick Santorum received 2,481,962 votes (53.5% of votes for major party candidates) to Democrat Ron Klink's 2,154,908 votes (46.5%).)

28. The new plan will have serious consequences on the Pennsylvania congressional delegation's ability to represent the preferences of Pennsylvania voters. Despite the Commonwealth's 50/50 split between Democrats and Republicans - or, more accurately, its slight preference for Democrats - the new plan will likely result in a congressional delegation consisting of 13 Republicans and 6 Democrats. Some Republicans have boasted that their majority will be even greater, producing a 14-to-5 edge. Thus, even if they continue, as they have, to receive more than 50% of the vote in congressional elections, Democratic candidates will win less than 1/3 of the seats in Congress; Republicans, receiving less than half of the total votes cast, will receive twice (and almost three times) as many congressional seats.

HARM CAUSED BY SB 1200

29. SB 1200 harms the people of Pennsylvania, particularly Democratic voters, such as plaintiffs, and the Democratic Party, in several distinct ways. First, SB 1200 dilutes the votes of people living in districts that are overpopulated, i.e., contain more than 646,371 people. Those districts include Districts 4, 6, 7, 9, 10, 11, 13, 14, 15, and 19. It does so without any legitimate justification.

30. SB 1200 is also an egregious partisan gerrymander. A partisan gerrymander refers to a district-based election system that rigs a political system in favor of one party. Indeed, Congress has outlawed the use of multi-member districts in drawing congressional districts, 2 U.S.C. § 2(c), precisely because such districts allow a majority party in the state legislature to rig the congressional elections in their favor. A partisan gerrymander does precisely the same thing.

31. By "packing" voters of one party in some districts and "cracking" or fragmenting them in others, a partisan gerrymander ensures that one party wins more representation than its voting strength would otherwise allow. It thus dilutes the voting strength of voters of the other party. The effect of a partisan gerrymander is often referred to as bias - the lines are drawn in such a way as to favor (to be biased toward) one party, which is able to win more representation with fewer votes.

32. SB 1200 is a massive political gerrymander. It packs and fragments Democratic voters to ensure that their votes are worth less than Republican votes. Thus, although Pennsylvania is a 50/50 state, SB 1200 was designed to ensure that Republicans would win

at least 13 of the 19 congressional seats. In terms of bias, SB 1200 gives Republicans a bias of over 18% - for less than 50% of the votes, they receive at least 68% of the seats in Congress. The plan does not merely fail to apportion seats proportionally; it maximizes the Republicans' partisan advantage to the exclusion of all other criteria. In terms of magnitude, SB 1200 is one of the most egregious partisan gerrymanders in recent history. It is significantly worse than that challenged in *Davis v. Bandemer*, 478 U.S. 109 (1986), in which the Supreme Court recognized the justiciability of partisan gerrymandering. It gives one party a two- or three-to-one advantage based on nothing other than the packing and cracking of voters.

33. This bias will not apply in simply one political election, but will affect every future election under SB 1200, regardless of the political conditions. It cements Republican power and effectively reduces Democrats to being a small minority of the Commonwealth's congressional delegation for the coming election and likely the coming decade.

34. By diluting the voting strength of Democratic voters, SB 1200 operates to minimize or cancel out the votes of Democrats, solely because the dominant party in the State Legislature does not like their political point of view and how they vote. SB 1200 consistently and systematically degrades the influence of Democratic voters on the political process as a whole, denies them fair representation, and penalizes Democratic voters for their views. Given that Democratic voters make up a small majority of the voters in Pennsylvania, SB 1200 will frustrate the will of the majority to influence the political process.

35. The harms caused by SB 1200 go well beyond the statewide dilution of Democratic voting strength. SB 1200 dramatically affects the Democratic Party's prospects for success in congressional elections in Pennsylvania in other ways and will operate to reduce the choices that voters, and particularly Democratic voters, will have in Pennsylvania elections. Political success depends on a variety of factors, including party organizing, recruitment of viable candidates, fund-raising, and voter turnout efforts. These factors, in turn, depend in large part on the party's potential for success. Because of the bias created by SB 1200, the Democratic Party will have greater difficulty in fielding competitive candidates. Further, those candidates who do run will find it more difficult to raise the money necessary to compete effectively, because potential donors will be hesitant to support losing candidates.

36. By locking down control of the congressional delegation, Republicans have leveraged their control over other aspects of the Pennsylvania political structure to essentially shut Democrats and Democratic voters out of the political process. Republicans already control the General Assembly and the Governor's office; SB 1200 itself is evidence that they will use that political power to minimize the voice of Democratic voters so that they might advance the Republican agenda in Pennsylvania and in national politics. SB 1200 installs the Republican Party as the dominant party in Pennsylvania - based solely on bias and unfairness, not on votes.

37. Democratic voters, such as plaintiffs, will also suffer harm due to the impact of SB 1200 on representation of Pennsylvania voters. The fact that 13 or

14 districts are now designated as "Republican districts" means that Pennsylvania Democrats - who compose a majority of the state - will now be increasingly represented by members of Congress who do not represent their views. As with race, when a district - indeed an entire state's redistricting plan is obviously created solely to effectuate the interests of one political group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than the constituency as a whole. Indeed, the presumption that a winning candidate represents all of the district's constituents is not as strong here as it is in the case of a racial gerrymander, where there is no necessary connection between a voter's or candidate's race and his or her political views. In a partisan case, the presumption no longer holds, because the connection between one's partisan affiliation and his or her political views is much closer than the connection between a voter's race and his or her political views. Even those voters whose political views do not perfectly correlate with their representatives' views are better represented by a representative of their own political party than one of another party. Although representatives may still be responsive to the interests of independent voters whose vote they may aim to capture, they are non-responsive to - and can entirely ignore - voters who support the opposing party.

38. SB 1200 also harms plaintiffs and other Democratic voters in Pennsylvania because it clearly and improperly draws distinctions and doles out benefits on the basis of political party. Unlike a redistricting plan that seeks to balance partisan success between the two parties or one which takes politics into account, SB 1200 creates favored and disfavored groups, and sends a clear message

to the people of Pennsylvania - electing Republicans is more important than the will of the majority and Democrats are to be penalized because their views are not favored by the majority in the General Assembly. By relying exclusively on a principle of maximum partisan advantage, the General Assembly's plan thus classifies and discriminates against voters solely because of their party affiliations. Plaintiffs' ability to associate with other Democratic voters to support their candidate of choice has been uniquely harmed, not by any accident of geography, but by an intentional effort to degrade a class of voters' ability to influence the political process.

39. SB 1200 also harms Democratic voters in the Commonwealth because it is, on its face and intentionally, legislation that exults Republican advantage over any legitimate criterion for governmental decisionmaking. Classifications based on political affiliation, like those based on race, are ordinarily impermissible, but the Supreme Court has indicated that such classifications may be permitted when drawing districts. In the line of cases that started with *Shaw v. Reno*, 509 U.S. 630 (1993), the Supreme Court recognized that even a factor that might otherwise be permissible can render a plan unconstitutional when used to the exclusion of all other criteria. The problem is not that the General Assembly considered politics, but that it subordinated - indeed ignored - all traditional redistricting principles and all legitimate bases for governmental decisionmaking, in order to favor those with one political viewpoint over another, thus implicating fundamental rights protected by the U.S. and Pennsylvania Constitutions. SB 1200 is so irregular on its face that it rationally can be viewed only as an effort to segregate voters to advance the interests of one political party,

without regard for traditional redistricting principles and without any legitimate or compelling justification.

40. The very fact that the General Assembly has subordinated all legitimate criteria to political preference is itself a violation of the Equal Protection Clause. While politics will always plan an important role in redistricting, this was not politics as usual. The General Assembly's plan has exceeded ordinary politics, and thus requires judicial intervention. It will impose serious handicaps on Pennsylvania Democrats' efforts to participate in the political process and leaves Pennsylvania Democrats shut out of the congressional electoral process.

CLAIM I

41. Plaintiffs incorporate by reference Paragraphs 1 through 40.

42. The facts herein alleged constitute a denial or abridgement of the plaintiffs' right to vote for their Representative to the United States Congress, in violation of Section 2 of Article I of the United States Constitution, as amended by Section 2 of the Fourteenth Amendment, and Section 4, Article I of the United States Constitution.

CLAIM II

43. Plaintiffs incorporate by reference Paragraphs 1 through 42.

44. The facts herein alleged constitute a denial to the plaintiffs of the equal protection of the laws as guaranteed to them by the Equal Protection Clause of

Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM III

45. Plaintiffs incorporate by reference Paragraphs 1 through 44.

46. The facts herein alleged constitute an abridgement of the privileges and immunities of citizenship guaranteed to the plaintiffs by the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM IV

47. Plaintiffs incorporate by reference Paragraphs 1 through 46.

48. The facts herein alleged constitute a denial or abridgement of the plaintiffs' right to free association as guaranteed to them by the First Amendment to the United States Constitution.

CLAIM V

49. Plaintiffs incorporate by reference Paragraphs 1 through 48.

50. The facts herein alleged constitute a violation of Section 1983 of Title 42 of the United States Code.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

A. Assume jurisdiction of this matter and convene as a three judge District Court pursuant to Section 2284 of Title 28 of the United States Code;

B. Enter a declaratory judgment that the congressional districting plan that the General Assembly passed on January 3, 2002 violates plaintiffs' rights under the aforesaid provisions of the United States Constitution and federal law;

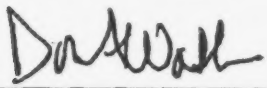
C. Enjoin permanently the defendants, their officers, agents, employees, attorneys, successors in office, from conducting primary or general elections, by themselves or in concert with other persons, using the January 3, 2002 General Assembly congressional districting plan or any other congressional districting plan that violates the United States Constitution or federal law;

D. Impose by Court order a new congressional redistricting plan that meets the requirements of the United States Constitution and federal law that will be in effect for the 2002 elections and enjoin the defendants from enacting or implementing a new redistricting plan until the 2004 elections;

E. Grant plaintiffs their reasonable attorneys' fees, litigation expenses, and court costs; and

F. Grant plaintiffs any other relief that the Court finds appropriate and equitable.

Respectfully submitted,



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Dated: January 11, 2002

Supreme Court, U.S.
FILED
JUL 15 2002
OFFICE OF THE CLERK

(4) (3)

Nos. 01-1817 and 01-1823

IN THE

Supreme Court of the United States

ROBERT C. JUBELIRER, *et al.*,
Appellants,

v.

RICHARD VIETH, *et al.*,
Appellees.

GOVERNOR MARK S. SCHWEIKER, *et al.*,
Appellants,

v.

RICHARD VIETH, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

APPELLEES' MOTION TO AFFIRM

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Appellees – plaintiffs in the district court – hereby respond to the jurisdictional statements filed by Robert C. Jubelirer *et al.* in No. 01-1817, and by Governor Mark S. Schweiker *et al.* in No. 01-1823 (hereinafter jointly referred to as "appellants" or "defendants"). As we show, the district court's ruling was a plainly correct application of the law established by this Court to the facts established at trial, and it should be summarily affirmed.

STATEMENT

Act 1 – the law at issue here – was a congressional redistricting plan enacted by the Pennsylvania General Assembly in January 2002. As discussed in appellees' own jurisdictional statement in No. 01-1873, where appellees are appealing the dismissal of their claims of political gerrymandering by the same three-judge district court, Act 1 reflected very little concern about adherence to traditional and legitimate redistricting criteria such as compactness, respect for political subdivisions and communities of interest, minimizing change from the prior districts, avoiding contests between incumbents, and the like. These criteria were largely abandoned wherever necessary to produce a map aptly characterized as "the most partisan congressional gerrymander of this young century, and among the worst in the last several decades of the earlier millennium." Gregory M. Harvey, *Redistricting Plan Draws the Line Between Equal and Fair*, Legal Intelligencer, May 20, 2002, at 6.

Act I, unlike many congressional district maps enacted by state legislatures in the round of redistricting following the 2000 census,[1] also did not achieve perfect population equality among the districts – *i.e.*, districts that all had the same

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[1] *See* http://www.ncsl.org/programs/legman/redistrict/redistpopdev.htm (table on web site of the National Conference of State Legislatures).

population or differed by one person where mathematically necessary. The largest and smallest districts in Act 1 differed by 19 persons.

Plaintiffs brought suit in January 2002, alleging that Act 1 was unconstitutional both because it contained an unjustified departure from population equality and because the partisan bias in the map – likely to produce a 14-5 or 13-6 Republican advantage in the Pennsylvania delegation even if Republican candidates received less than half the votes for Congress – was so extreme that the map constituted an illegal "political gerrymander." Jubelirer J.S. App. 25a-43a.

Defendants moved to dismiss both claims. The three-judge court (Circuit Judge Nygaard and District Judges Rambo and Yohn) agreed to dismiss the partisan gerrymandering claim, concluding that although plaintiffs had adequately alleged the requisite partisan intent and a sufficient level of partisan bias in the map, they were required under *Davis v. Bandemer*, 478 U.S. 109 (1986), to allege in addition that Democrats would be unable even to participate in the political process – *i.e.*, prevented from organizing, fielding candidates, and campaigning for office. Schweiker J.S. App. 40a-47a.[2]

The court, however, refused to dismiss the one-person, one-vote claim. It noted that plaintiffs had alleged that the districts in Act 1 did not achieve perfect population equality. *Id.* 37a. It rejected defendants' argument that the population

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[2]Appellees' basic argument as appellants in No. 01-1873 is that this additional requirement – effectively demanding a showing that the State is engaging in grotesque violations of First Amendment rights independent of the partisan bias in its districting map – makes no sense, draws no support from *Davis v. Bandemer*, and completely undercuts this Court's ruling there that partisan gerrymandering claims are justiciable.

deviation alleged, 19 persons, is too small to raise a constitutional concern. *Id.* In so doing, it relied on this Court's definitive analysis of constitutional one-person, one-vote requirements in *Karcher v. Daggett*, 462 U.S. 725 (1983). *Id.* ("'[T]here are no *de minimis* variations, which could practically be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification.'") (quoting *Karcher*, 462 U.S. at 734). The district court also rejected the argument that plaintiffs were required at the pleading stage to allege that an alternative plan would have eliminated the population deviations. *Id.* 38a.

The one-person, one-vote claim accordingly went to trial on an expedited basis in March 2002. At trial, it was undisputed that the districts in Act 1 had a 19-person deviation. Jubelirer J.S. App. 7a. Plaintiffs introduced an example of a map that achieved perfect population equality – thus establishing that nothing prevented the State from doing so if it so chose. *Id.* That map also achieved perfect population equality without splitting a single voting precinct anywhere in the State, *id.*, which has traditionally been a goal in Pennsylvania. The map drawer, Robert Priest, described a process by which it is always possible both to minimize population deviations and to avoid precinct splits. *Id.* 12a. As he said, once one has a rough draft of a map, with districts built using whole precincts that are near population equality, there are literally thousands of potential "precinct swaps" that can be made across the line dividing any two of the districts. It is a relatively simple matter for a computer to analyze the options and identify those that produce perfect population for both districts. *See* Appellees' App. 2a-3a.[3]

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[3]In this Motion, "Appellees' App. _a" refers to pages of the Appendix attached hereto.

Plaintiffs also attempted to anticipate defendants' argument by introducing expert testimony addressing the *real* basis for Act 1's districting choices. That testimony established that the primary consideration animating the drawing of the lines in Act 1 was not any of the neutral criteria listed in *Karcher* as potential justifications for a population deviation, but instead was partisan advantage. *See id.* 4a-6a; *see also* Jubelirer J.S. App. 13a..

Defendants then introduced evidence attempting to offer a neutral justification for their map. Their claim was that the map drawers had stopped short of achieving perfect population equality in an effort to minimize precinct splits. The witness they called to support that argument was a map drawer, Dr. John Memmi, who disclaimed any knowledge of the actual goals that were being pursued by the senior Republican staffers who directed his map drawing. *See* Appellees' App. 7a-8a, 11a. He agreed with plaintiffs' map drawer that there was nothing in principle that would prevent a map from achieving both perfect population equality and zero precinct splits, as long as the map drawer had sufficient flexibility to make the precinct swaps required. *See id.* 11a-12a.

Memmi then described the actual process that led to Act 1. He said that the map existed in rough form and he made some efforts to achieve population equality without using precinct splits, by moving around whole precincts as described by Mr. Priest, producing perfect populations in three districts. *See* Jubelirer J.S. App. 9a, 11a-12a. At that point, however, he was instructed to avoid any further shifts of whole precincts across district lines and to reduce population deviations thereafter only by shifting "census blocks." *Id.* 12a. That methodology necessarily involves creation of split precincts, since census blocks are components of precincts. *Id.* Then, when the plan's

total population deviation had been reduced to 19 persons, he was instructed to stop making any changes. *Id.* 9a.

In sum, the evidence established that defendants (1) had available a methodology for achieving perfect population equality while avoiding precinct splits, (2) knew about and used that methodology during one phase of the map-drawing process, but (3) stopped doing so when the political operatives in charge made the judgment that they did not want to make the additional changes in the district lines that occur when whole precincts are "swapped." No evidence was offered concerning the reasons why the political operatives supervising Dr. Memmi made that last decision.

Based on this record, the district court concluded that defendants had failed to justify the population deviations in Act 1 on the basis of their desire to avoid precinct splits.[4] It recognized that the sole cause of precinct splits in the map was the decision of Memmi's "superiors in the Republican caucus" to instruct him "only to manipulate census blocks and not precincts." *Id.* 12a. Because the evidence showed that defendants could have eliminated any population deviation and eliminated all precinct splits – if only they were willing to make the modest changes in their preferred map entailed by shifting a handful of whole precincts – the proffered justification for the 19-person deviation was a "mere pretext." *Id.* 11a. The court commented that the

> logical inconsistency [in defendants' position] is so deep that it causes us to pause and

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[4]Judge Yohn dissented, concluding that defendants "just barely" met their burden of justifying the population deviations in Act 1. Jubelirer J.S. App. 18a.

> consider the sincerity of such proffer. If Defendants truly wanted to avoid splitting precincts, they would have done so by enacting a zero deviation map that did not split *any* precincts.

Id. 12a.

The court then addressed the issue of remedy. It rejected plaintiffs' request that it select a remedial map of its own. To the contrary, the court chose to defer to the prerogatives of the General Assembly and gave defendants three weeks to come back to court with a constitutionally sound districting plan enacted by the General Assembly. *Id.* at 15a.[5]

REASONS TO AFFIRM

Appellants offer no persuasive reason to overturn the decision of the district court holding Act 1 unconstitutional. Although the population deviations in this case were relatively small, *Karcher* makes clear that there are no population deviations in congressional district maps that are so small that they can be considered "*de minimis*" and thus pass constitutional muster without any justification. Thus, here, at least after plaintiffs had proffered an alternative map that eliminated all deviations, the court was correct to require defendants to offer some justification – however minimal – of the 19-person deviation in Act 1.

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[5]The General Assembly did then pass a new map – Act 34 – that defendants contended solved the constitutional problem. Plaintiffs disagreed, and that issue is still being litigated in the district court. Resolution of the remedial dispute became less urgent when the district court chose to stay its initial ruling, thus allowing Act 1 to be used in this year's elections. Schweiker J.S. App. 87a-88a.

What it received was not a justification but a "mere pretext" that caused the court to doubt the "sincerity" of defendants' proffer. The evidence simply did not support the claim that the population deviations resulted from a desire to minimize precinct splits. To the contrary, the evidence was crystal clear that defendants (1) could have avoided all precinct splits while achieving perfect population equality, but (2) *chose* instead to *create* precinct splits by lowering population deviations through shifts of individual census blocks, and then (3) further *chose*, when the deviations had been lowered to19, to stop their efforts to reduce the deviations. The only possible conclusion was that defendants' map drawers had been unwilling to make the modest additional changes in their carefully calibrated map that would have been required to achieve population equality while keeping all precincts intact. But defendants offered *no* justification to support that reticence – presumably because they would have been required to admit that the real concern was upsetting a fine-tuned effort to guarantee election of 13 or 14 Republican members of Congress, even if Republican candidates (as usual) received less than half the statewide vote.

Especially given the ease with which modern computers allow States to achieve perfect population equality in congressional districts, there is no reason to consider overruling the *Karcher* principle that all avoidable population deviations require some justification. Nor is there any reason to overturn the district court's factual finding that the justification proffered here was a "mere pretext." No matter how small the deviation at issue, the requirement of some justification would be meaningless if it could be satisfied by mere articulation of a neutral goal like avoiding split precincts – in the face of evidence showing that the defendants could have achieved that goal while achieving population equality, but deliberately chose not to do so.

I. THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS WERE REQUIRED TO SHOW A JUSTIFICATION FOR THE POPULATION DEVIATIONS AMONG DISTRICTS.

In *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court articulated without ambiguity the criteria for judging population deviations in congressional redistricting plans. In the first place, the Court rejected the notion of a *de minimis* population variation that warranted no further scrutiny. *Id.* at 734. Any deviation, therefore, must be subjected to the two-part test that the *Karcher* Court outlined. First, challengers to a plan must show that the "population differences were not the result of a good faith effort to achieve equality." *Id.* at 731. Second, once the first part of the test is satisfied, the burden of proof shifts to the defendants, who must prove that the population variations are "necessary to achieve some legitimate goal." *Id.* The district court faithfully applied the *Karcher* test.

A. This Court in *Karcher* Squarely Rejected Appellants' Argument for a *De Minimis* Exception to the Population Equality Mandated By the One-Person, One-Vote Standard.

In considering the population deviations among the congressional districts created by Pennsylvania's Act 1, the district court engaged in a straightforward application of this Court's one-person, one-vote jurisprudence. Appellants recognize, as they must, that the Court in *Karcher* reinforced its longstanding commitment to the principle of equal population in congressional districts, *see Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1964), "reaffirm[ing] that there are no *de minimis* population variations, which could practically be avoided, but which nonetheless meet the standard of Art. I, § 2, without

justification." *Karcher*, 462 U.S. at 734. Appellants now ask this Court to overrule *Karcher* and create a *de minimis* exception to the one-person, one-vote rule that would allow the creation of unequal congressional districts without *any* justification whatsoever. There is no reason to revisit the long-standing, unambiguous *Karcher* standard.

Appellants' arguments here are nothing new, and were squarely rejected in *Karcher*. The Court in *Karcher* dismissed the notion, pressed by appellants here, that "small deviations [are] the functional equivalent of equality." *Id.* at 735. Accordingly, the Court rejected an appeal to purported statistical imprecision and declined to draw a "*de minimis* line that gives [an] illusion of rationality and predictability." *Id.* As *Karcher* made abundantly clear, there are compelling reasons why "absolute population equality [is] the paramount objective of reapportionment." *Id.* at 732. For example, only absolute equality can ensure that the impact of any statistical imprecision is kept to a minimum. *See id.* at 736-38 (explaining why the census undercount rate cannot be an acceptable margin of error); *id.* at 737 n.8 (explaining how the census margin of error could exacerbate actual deviations because the census undercount will not be uniformly spread across districts). *Karcher* unequivocally reaffirmed that, "[a]s between two standards – equality or something less than equality – only the former reflects the aspirations of Art. I, § 2." *Id.* at 732.[6]

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[6]The Court in *Karcher* offered several additional reasons to reject a *de minimis* exception: "Adopting any standard other than population equality, using the best census data available, would subtly erode the Constitution's ideal of equal representation. If state legislators knew that a certain *de minimis* level of population differences were acceptable, they would doubtless strive to achieve that level rather than equality. Furthermore, choosing a different standard would import a high degree of arbitrariness

In the nineteen years since *Karcher*, there have been no legal or factual developments that cast any doubt on the basic constitutional requirement of population equality in congressional redistricting. To the contrary, technological advancements since *Karcher* have made it increasingly simple to draw districting maps with absolute precision, making population deviations even easier to eliminate than at the time of *Karcher*. By 1983, this Court concluded that absolute population equality was a technologically achievable goal:

> If anything, this [one-person, one-vote] standard should cause less difficulty now for state legislatures than it did when we adopted it in *Wesberry*. The rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has. . . . [T]o abandon unnecessarily a clear and oft-confirmed constitutional interpretation would impair our authority in other cases, would implicitly open the door to a plethora of requests that we reexamine other rules that some may consider burdensome, and would prejudice those who have relied upon the rule of law in seeking an equipopulous congressional apportionment.

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into the process of reviewing apportionment plans. In this case, appellants argue that a maximum deviation of approximately 0.7% should be considered *de minimis*. If we accept that argument, how are we to regard deviations of 0.8%, 0.95%, 1%, or 1.1%?" *Karcher*, 462 U.S. at 731-32 (citations omitted).

Karcher, 462 U.S. at 733-34 (citations omitted). As the trial evidence in this case confirms, *see infra* Part I.B., zero population deviation is an even simpler task in today's redistricting world.

Karcher's bright-line rule rejecting *de minimis* population deviations hardly creates the potential for "disrepute" feared by appellants. *See* Jubelirer J.S. at 12. As made clear both in *Karcher* and the district court's application of the *Karcher* standard, the requirement of absolute population equality is merely the first step in the one-person, one-vote analysis. The existence of avoidable population deviations simply triggers the State's obligation to justify those deviations with legitimate redistricting criteria. And, as recognized by the district court, any legitimate justifications need only be proportional to the deviations at issue. *See* Jubelirer J.S. App. 11a (citing *Karcher*, 462 U.S. at 741). Thus, with deviations as small as those in Act 1, congressional redistricting likely will be unconstitutional only where, as here, *see infra* Part II, the State offers absolutely no legitimate justification for the population inequalities.

B. The District Court Properly Concluded that Act 1 Was Not the Result of a Good-Faith Effort to Achieve Absolute Equality.

The district court's application of the first prong of the *Karcher* test was entirely proper and wholly unremarkable. Under *Karcher*, a reviewing court "must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Karcher*, 462 U.S. at 730. Plaintiffs plainly met their burden under the first prong of *Karcher*.

As the district court found, the evidence at trial

"conclusively demonstrates that [Act 1's] population deviation was avoidable." Jubelirer J.S. App. 7a. Both defendants and plaintiffs submitted at trial alternate maps that achieved zero population deviation. In addition, "[w]itnesses presented by both parties testified that it would have been relatively easy to take *any* plan or map and reach a point of zero population deviation." *Id.* (emphasis added).

Indeed, defendants' sole witness familiar with the map-drawing process conceded that no good-faith effort was made to achieve population equality in Act 1. As noted by the district court, "once he reached the point of a 19-person deviation, he was told to stop manipulating the map." *See* Jubelirer J.S. App. 9a. The undisputed evidence makes clear that defendants were working toward a standard that was something less than the absolute equality mandated by Article I, Section 2. Act 1, then, was not the result of a good-faith effort to achieve absolute equality.

C. The District Court Properly Rejected Defendants' Claim that the Absence of Alternative Maps Before the Legislature Evinced Good Faith.

Appellants' jurisdictional statements offer nothing to undercut the district court's conclusion that the first prong of the *Karcher* test is satisfied here.[7] Unable to point to positive evidence of a good-faith effort, they resort to questioning the district court's consideration of the alternative maps that demonstrate the possibility of achieving zero deviation.

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[7]Even Judge Yohn in dissent, on whom appellants otherwise rely, agreed that "the plaintiffs . . . met the first prong of the *Karcher* test." Jubelirer J.S. App. 18a.

Appellants contend at length that only maps actually before the legislature can be introduced to demonstrate the feasibility of zero deviation and suggest that the absence of any such alternative maps in the legislative process should be accepted as evidence of a good-faith effort. This line of argument, however, is directly contradicted by *Karcher*. Indeed, even though in *Karcher* alternative plans had been considered by the legislature, the Court made clear that these need not be the foundation of a finding that greater parity of population among districts was possible, explaining that "it was unnecessary for the district court to rest its finding on the existence of alternative plans." *Karcher,* 462 U.S. at 739.

As the district court recognized, the *Karcher* standard mandates -- in the absence of some legitimate justification -- the adoption of the most equally apportioned plan *possible*, not the most equally apportioned plan that has so far come to light:

> Although in *Karcher*, the legislature had before it other plans with less deviation, the Court never endorsed such a requirement. . . . If we were to adopt the limited analysis suggested by the Defendants, we would be adopting a view that would isolate grossly disproportionate plans from constitutional scrutiny on the sole basis that such plans constitute the plan with the least deviations *available*. *Karcher* is wrought with references indicating that the least deviation *possible* is that which should govern the analysis.

Jubelirer J.S. App. 7a-8a n.3.

Appellants also argue that any alternative map

demonstrating that population deviation was avoidable must, even at the first stage of a *Karcher* inquiry, somehow replicate the contours and details of Act 1. *See, e.g.*, Jubelirer J.S. at 9, 14. Again, however, this argument is flatly foreclosed by *Karcher*. Certainly, legitimate political considerations theoretically might require some deviation, but *Karcher* made clear that these considerations are to be addressed at the second stage of the inquiry. As this Court explained, "the claim that political considerations require population differences among congressional districts belongs more properly to the second level of judicial inquiry in these cases, in which the State bears the burden of justifying the differences with particularity." *Karcher*, 462 U.S. at 739.

II. DEFENDANTS OFFERED NO LEGITIMATE, CONSTITUTIONALLY PERMISSIBLE JUSTIFICATION FOR THE POPULATION DEVIATIONS IN ACT 1.

Karcher makes clear that in the absence of a "good faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Karcher*, 462 U.S. at 731. As found by the district court and discussed below, the State failed to meet its burden under this second prong of the *Karcher* test. At trial, defendants made only one attempt to tie the particular deviations in Act 1 to some legitimate redistricting criterion. Having reviewed the relevant trial testimony, the district court found as a fact that the proffered justification was pretextual. This Court should leave that determination undisturbed and summarily affirm the district court's decision.

A. There Is No Reason to Disturb the District Court's Factual Determination that Defendants' Sole Proffered Justification for the Deviations in Act 1 Was Pretextual.

Required to justify Act 1's departure from the one-person, one-vote standard, defendants offered only one putative rationale at trial: a desire to avoid splitting precincts. But while such a rationale is, in the abstract, surely legitimate, it cannot justify population deviations if the purported justification is, as the district court concluded, "a mere pretext." *See* Jubelirer J.S. App. 11a.

Even if defendants' burden under the second prong of the *Karcher* test is not particularly heavy (given the small deviation), the second prong must require more than a simple incantation of some well-recognized redistricting concerns. Supposed justifications must be supported by the evidentiary record. Considering the evidence before it, the district court concluded that the sole proffered justification was without factual support. Act 1 remains, then, an unjustified violation of the one-person, one-vote standard.

There is no reason for this Court to disturb the factual findings of the district court. The Court has always been "mindful that the District Court's findings of fact must be upheld unless they are clearly erroneous." *City of Rome v. United States*, 446 U.S. 156, 183 (1980); *see also, e.g., Johnson v. De Grandy*, 512 U.S. 997, 1022 (1994); *Thornburg v. Gingles*, 478 U.S. 30, 78-79 (1986). In this case, each of the district court's findings is amply supported by the record, included the uncontradicted testimony of defendants' own witness. All trial testimony confirmed the ease of creating a zero-deviation map with no precinct splits. *See* Jubelirer J.S.

App. 11a-12a. Indeed, the State's map-drawer began a process of limiting both deviations *and* precinct splits, but was soon instructed by his superiors to discontinue that process in favor of one that would *increase* precinct splits. *Id.* 12a. The clear "logical inconsistency," *id.*, in appellants' position is compounded by the fact that "none of the congressional districts that have split precincts [has] an ideal population." *Id.*

The district court's finding of pretext was further bolstered by the wealth of trial evidence demonstrating the State's true motivation in designing Act 1: the maximization of Republican partisan advantage at the expense of all legitimate redistricting principles. As the district court found, "of the maps presented at trial, Act 1 is that which least comports with the neutral legislative policies that the *Karcher* Court stated would justify a Congressional redistricting plan with some deviations." *Id.* 13a.[8] For example, Act 1 did not create compact districts, did not minimize county and municipal splits, did not minimize precinct splits, and did not minimize the contests between incumbents (in particular, Democratic incumbents). *Id.* These findings provide additional support for the notion that partisan

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[8]The criteria for justifying a departure from absolute equality are outlined in *Karcher*:

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent representatives. As long as the criteria are nondiscriminatory, these are all legitimate objectives that on a proper showing could justify minor population deviations.

462 U.S. at 740.

advantage – and not a desire to minimize precinct splits – was the true motivation behind Act 1.

Appellants now attempt to argue that the mere recital of any supposed rationale should be accepted as legitimate and sufficient without any further scrutiny whatsoever. They further contend that the district court's unwillingness simply to accept the proffered justification without regard to its credibility makes the second prong of the *Karcher* test impossibly to satisfy.

These arguments are unpersuasive for two reasons. First, as litigation in the lower courts makes clear, congressional maps with population deviations routinely survive one-person, one-vote challenges upon a credible showing of legitimate justification. *See, e.g., Graham v. Thornburgh*, No. 02-4087-JAR, 2002 WL 1453796, at *7-*10 (D. Kan. July 3, 2002) (upholding a plan with small population deviations that were made necessary by State's interests in maintaining minority voting strength, balancing the claims of various communities of interest, and prioritizing the contiguity and compactness of districts); *Stone v. Hechler*, 782 F. Supp. 1116, 1127 (N.D. W. Va. 1992) (holding that "preserving the cores of prior districts" and "compactness" were legitimate justifications for small population deviations); *Turner v. State*, 784 F. Supp. 585, 588 (E.D. Ark. 1991) (holding that "to the extent possible, [leaving] people and counties within the same congressional district" was a legitimate justification); *Anne Arundel Co. Republican Cent. Comm. v. State Admin. Bd. of Election Laws,* 781 F. Supp. 394, 397 (D. Md. 1991) (upholding congressional map and finding *Karcher*'s second prong satisfied where justifications of regional integrity, the creation of minority voting districts, and incumbent protection were "all legitimate objectives that *on a proper showing* could justify minor population deviations")

(quoting *Karcher*) (emphasis added).

Second, accepting appellants' position would deprive district courts of their traditional fact-finding authority. Without the ability to assess the credibility and plausibility of a State's proffered justification, district courts would be forced to rubber-stamp any explanation whatsoever, thereby completely eviscerating the one-person, one-vote standard.

In sum, although respect for whole precincts might justify some deviation from equal population, there was no showing in this case either that this was a genuine concern in the map-drawing process or that the deviations were necessary to achieve the goal of avoiding split precincts.

B. Defendants Offered No Other Legitimate Justifications for the Population Deviations in Act 1.

Defendants at trial made only one serious attempt to justify the population deviations in Act 1. Given the plainly pretextual nature of that justification, appellants now attempt to sweep in a variety of additional rationales to save Act 1. *See* Jubelirer J.S. at 20-21 (listing (1) "the maintenance of two majority-minority districts," (2) "the protection of the senior member of Pennsylvania's congressional delegation," and (3) "the creation of an open seat in acknowledgment of the population growth in a particular part of Pennsylvania"). But while each of these justifications might, under the appropriate circumstances, satisfy the second prong of the *Karcher* test, their mere recitation hardly suffices.

The problem is that defendants failed to offer any testimony or evidence at trial suggesting how these

considerations supposedly made population deviations necessary. Irrespective of whether the stated concerns were elements of the redistricting process, appellants fail to recognize that even where the burden of justifying some deviation is minimal, *Karcher* requires more than a mere recitation of a few well-known policy considerations. In order for such considerations to function as *justifications*, it must be established that one or more of these considerations actually made deviation from equal population necessary. As the Court explained in *Karcher*, "the State must bear the burden of proving that *each* significant variance between districts was *necessary* to achieve some legitimate goal." *Karcher*, 462 U.S. at 731 (emphasis added).

The concerns identified by appellants might constitute legitimate justifications in theory, but, without some indication as to why they compel population deviations, they are not sufficient.[9] To accept appellants' argument would render the second prong of the *Karcher* test entirely meaningless, making the mere recital of recognized legitimate concerns an adequate response to the constitutional requirement of population equality.

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[9]Even if appellants' stated justifications actually affected each of the unequal districts in Act 1, appellants would still need to offer *some* evidence as to why, under *Karcher*, they necessarily lead to the deviations in question. However, on their face, the asserted post-hoc rationales do not even touch upon every unequal district in Act 1. Moreover, the plaintiffs' map that achieved perfect population equality while splitting no precincts also had two majority-minority districts and also protected the delegation's most senior member; obviously, the pursuit of the latter two objectives did not necessitate the deviations.

III. THE DISTRICT COURT'S REMEDY WAS BOTH APPROPRIATE AND DULY RESPECTFUL OF THE GENERAL ASSEMBLY'S PREROGATIVES IN REDISTRICTING

Finally, appellants contend that the district court, in essentially remanding the map to the Pennsylvania General Assembly for redrawing consistent with the Constitution within a reasonable time, has somehow usurped the General Assembly's political authority. They claim that the court ordered the General Assembly to produce a constitutional map, characterizing that supposed directive as a "commandeering" of the legislative body in violation of the principles established in *New York v. United States*, 505 U.S. 144 (1992). *See* Jubelirer J.S. at 22. But that case is wholly inapposite.

The district court engaged in no impermissible commandeering. It simply stated that the defendants had three weeks in which to come back to court with a duly enacted, constitutional remedial map.

In so doing, the court rejected plaintiffs' argument that the court should impose its own remedy immediately. Recognizing the authority of *White v. Weiser*, 412 U.S. 783 (1973), and mindful that "reapportionment is primarily a matter for legislative consideration and determination," Jubelirer J.S. App. 14a (quoting *Weiser*), the district court refrained from any such direct intervention in the redistricting process. Far from commandeering the General Assembly, the district court deferred to the legislature's ability "to enact a constitutionally sound redistricting plan." *Id.* 15a. The district court's order, then, does no more than provide a framework and timetable for the constitutional exercise of the General Assembly's redistricting responsibilities.

CONCLUSION

For the foregoing reasons, this Court should summarily affirm the district court's decision enjoining implementation of Act 1.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

RICHARD VIETH, et al.,	:	
Plaintiffs	:	
	:	
v.	:	NO. 1:CV-01-
	:	2439
THE COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
Defendants	:	

TRANSCRIPT OF PROCEEDINGS
REAPPORTIONMENT NONJURY TRIAL

VOLUME 1
(Pages 1 through 107.)

BEFORE: HON. RICHARD L. NYGAARD, Judge
HON. WILLIAM H. YOHN, JR., Judge
HON. SYLVIA H. RAMBO, Judge
DATE: March 11, 2002, morning session
PLACE: Courtroom Number Three Federal Building
Harrisburg, Pennsylvania

* * * *

[Direct Examination of Mr. Robert Priest]

BY MR. SMITH:
Q And did you employ a computer in that hunt?
A Yes, I did. The original plan would be drawn on AutoBound. Once I had a common boundary and the list of voting districts on either side of the boundary, I used an Excel spreadsheet to do a massive number of calculations and comparisons that we needed to come up with the zero deviation.
Q Can you give us an example of the number of combinations of precinct moves that you could calculate?
A If I had a common boundary with the fifteen precincts on either side, which is not an uncommon number -- in fact, fairly frequent number -- fifteen precincts would give me then basically 105 combinations of two precincts. So I would have 120 alternatives on either side of the line for populations that could be shifted.
You compare one to the other. You basically are getting close to 14,000 options of precinct movements looking at one and two precinct moves. If you start looking at three and four precinct moves, the number increases geometrically.
Q Once you have generated 14,000 different options, what do you do?
A You hunt for the option that has the difference in population which is the number that your current plan is either high or low from zero deviation.

Q In this process, did you split any precincts?
A No.
Q Have you utilized that same methodology to reduce the population deviation to zero with other maps?
A I have done that twice with other maps.
Q At least in your experience, is that a process that can be applied to any draft district map?
A Easily.
(Gerlach (44th) Senate District in the Sixth Congressional was introduced as Plaintiffs Exhibit 2C.)
BY MR. SMITH:
Q Let me ask you to turn over to Plaintiff Exhibit 2C.
A (Witness complies.)
Q I ask you is this a map that you prepared?
A Yes, it is.
Q It is a little confusing with the three colors. Can you explain what is represented here?
A This is basically a map to show the new Sixth Congressional District in Act 1.
Q Where is the new Sixth Congressional district?
A It is in the southeastern suburban Philadelphia area.
Q Why don't you point it out to us on Act 1 referring to Exhibit 2?
A The Sixth District is there.
Q What does Exhibit 2C show about that district?

A Basically, it takes a look at that district and the 44th Senate District from the last decade to show how much of the old 44th Senate District is embedded in the new Sixth. The colors on this map are basically -- the brown color is the portion of the 44th Senate District that made it into Congressional District 6. The green is the remainder of Congressional District 6, and the yellow is the portion of the 44th Senate District that is not in Congressional District 6.

Q Who is the current Senator from the 44th --

A Senator --

Q You have got to let me finish my question.

A Sorry. Senator Gerlach.

Q And is there an incumbent Congressman who resides in this district, Congressional District 6?

A No, there is not.

MR. SMITH: I move the admission of 2C, Your Honor.

MR. KRILL: I object to it, Your Honor, on the grounds of relevance. I think with this exhibit and the witness's testimony to it, we have departed from any relevance to the remaining issue in this case; namely, the one person-one vote principle.

I think counsel are trying to work their way back to the partisan gerrymandering claims that were dismissed by

the Court.
JUDGE NYGAARD: Your thoughts?
MR. SMITH: Your Honor, we are clearly going to present substantial evidence on partisan gerrymandering because it is directly relevant to the justification that I intend to offer.
JUDGE NYGAARD: Overruled.
MR. KRILL: Your Honor, excuse me. So that I don't disrupt the trial, would the Court grant me a continuing objection on grounds of relevance with respect to that issue?
JUDGE NYGAARD: With respect to -- why don't you tell us which ones you object to? It is not going to be to disruptive. Just jump up, and we will take it that you object.
MR. KRILL: Tell me when I am behaving too much like a jack-in-the-box. I will be happy to.
THE COURT: We are very easy. Just move it along. Let's go.
MR. KRILL: Thank you.
(Murphy (37th) Senate District in the 18th Congressional was introduced as Plaintiffs Exhibit 2D.)
BY MR. SMITH:
Q Let me ask you, Mr. Priest, to turn it over to Exhibit 2D.

A Yes.
Q Is this a map you prepared?
A Yes, it is.
Q And what does it represent?
A This is the 18th Congressional District in southwestern Pennsylvania. And it shows the embedded 37th -- 1990's 37 Senate District which was the district of Senator Murphy which is entirely contained within the 18th Congressional.
Q Just for some context here, the 37th District is located where in relation to the City of Pittsburgh?
A The City of Pittsburgh is the large white area directly north of the brown on this map.
Q Senator Gerlach and Senator Murphy are from which party?
A Republican.
MR. SMITH: I move the admission of 2D, Your Honor.

* * * *

[Cross Examination of Dr. John Memmi]

BY MR. SMITH:
Q Good morning, Dr. Memmi.
A Good morning, Mr. Smith.
Q Paul Smith. Do you have any prior experience with redistricting prior to this decennial census, this round of redistricting?
A No, sir. This is my initial foray into the redistricting jungle.
Q You said I believe that you are not part of the political leadership that was making decisions with how the maps would be drawn; true?
A Is that a question?
Q Yes. Did you say that?
A I did say that. I am not a member of-- I am an executive with the team. And I mean that in pure sense of the word. I will explain what I mean by that. In the pure sense of the word, people tell me -- my supervisors tell me what to do, and I do it.

Q And, therefore, you don't have any knowledge of the reasons why particular districts took on the configurations that they took on in Act 1; is that right?
A As I said, I follow the directions of my supervisors, and I do what they say. I have no input into whether a given district looked like a circle or a square or a stripe or anything else.
Q So you wouldn't be able to tell the Court why somebody decided in District 6 to go from Lower Merion up to part of the City of Reading in one district; would you?
A No.
Q Now you presented --
A May I clarify that answer?
Q Please.
A Not with a responsible basis for doing so.
Q Are you saying you might have heard something in the hallway?
A We all hear all sorts of things. But my job, again, is to follow the instructions of my supervisors and to do what they ask me to do. And that is what I do.
Q You presented some statistics about the population deviations in various plans that were presented as proposals in the General Assembly last December. Do you recall that testimony?
A Yes. Could you speak up a little louder? I don't hear

very well.
Q I am doing my best. I will try to speak louder.
A Thank you very much. I appreciate that. Would you please reask your question?
Q I was just trying to recall your testimony regarding the population deviations of the various plans that were presented to the Legislature in December.
Do you recall that testimony?
A Yes, I presented testimony on five plans that made their way to the floors of the Chambers of the State Legislature.
Q One of those plans was a DeWeese Plan. You labeled it DeWeese Proposal?
A Yes, sir.
Q And that was a proposal 4848; is that correct?
A Yes, sir.
Q And you didn't present any statistics on the population deviations in Mr. DeWeese's other proposed Amendment 4849; is that right?
A That is correct.
Q Do you know what the population deviations in that proposal were?
A I do not, sir.
Q Let me ask you to turn to Defendant Exhibit 8 which is the Senate passed plan of last December.

MR. SMITH: I believe that is in Binder One, Your Honor?
A I need that binder, please
BY MR. SMITH:
Q It is Exhibit 8.
A Yes, sir. Thank you. Just give me a moment, please.
Q You mentioned in your testimony that the black dots represent the residences of incumbents in the plan; is that right?
A That's correct.
Q And in this plan that was passed by the State Senate in December, there are four districts that contain two incumbents in them; is that right?
A I would like to go back and count them, but I trust from your judgment.
Q Let's go through them and look at them. First, there is District 14 in the Pittsburgh area that contains both Mr. Coyne's residence and Mr. Doyle's residence?
A Yes.
Q Then there was District 12 in the southwestern part of the state?
A Yes.
Q That contains both Murtha and Mascara?
A That's right. Representative Mascara's is right along the border of Washington County. It is difficult to see, but

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you are correct.
Q There is District 6 in the eastern portion of the state that contains both Mr. Holden and Mr. Kanjorski's district?
A Correct, sir.
Q There is proposed District 13 which contains both Mr. Hoeffel and Mr. Borski's; is that right?
A You are right there.
Q Those are all Democratic Representatives?
A They are, sir.
Q There were no other pairings anywhere in this plan?
A That's correct. Just for clarification, I had no input on those pairings or anything else of a political nature.
Q Thank you for that clarification. Now let's look at -- let's turn then to your New Years' Eve process of reducing the population deviations in what became Act 1.

* * * *

[Cross Examination of Dr. John Memmi]

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Q So you are saying it is more complicated and difficult to work with census blocks because there are so many more of them?

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A No. I am saying they are easier to work with because there are more choices, the population increments are smaller. In this Commonwealth we in fact have census -- I am sorry we have precincts that range in population from zero, zero to upwards of 6,000.
Again let me repeat that. From zero to upwards of 6,000. It might be 5800, but it is at least 5,000. And that is a daunting task when you are trying to move things around with time constraints.
Q Did you hear Mr. Priest's testimony if he had fifteen precincts along one side of a boundary and fifteen precincts along the other side of the boundary, he could generate 14,000 options of precinct switches that would potentially produce an ideal population?
A I did hear Mr. Priest testify to that. On the face of it -- because I haven't done it myself, on the face of it, his approach makes sense to me as a scientist. I haven't tested it.
Q Now what you did instead was to move very, very small numbers of people at times. It is true, for example, isn't it, that there are census blocks that have two, three or four residences in them?
A There are plenty of empty census blocks. There are census blocks that have two, three or four people in them. There are census blocks that have -- if you go to my sheet,

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the handwritten sheet, one gets a sample of population sizes in census blocks. So there can be as many as a hundred. Census block population size is variable.

* * * *

Supreme Court, U.S.
FILED
JUL 29 2002
OFFICE OF THE CLERK

No. 01-1817

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

ROBERT C. JUBELIRER AND MATTHEW J. RYAN,
Appellants

v.

RICHARD VIETH, et al.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OPPOSING MOTION TO AFFIRM

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JULY 29, 2002

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INTRODUCTION

Pursuant to Supreme Court Rule 18.8, Appellants Jubelirer and Ryan ("Presiding Officers") file this Brief in Opposition to the Motion to Affirm submitted by Richard Vieth, et. al (Appellees herein and Plaintiffs below). The Motion to Affirm only reinforces the need for this Court to clarify the legal basis and standards for assessing one-person, one-vote claims such as the one involved here.

ARGUMENT

I. The *Karcher* Test

In response to Presiding Officers' request that the Court reconsider its refusal to recognize a *de minimis* standard for population deviation in *Karcher v. Daggett*, 462 U.S. 725 (1983), Appellees posit that "[t]here is no reason to revisit the long-standing, unambiguous" test set forth in *Karcher*. Motion to Affirm at 9. Appellees urge that "[t]echnological advancements since *Karcher* have made it increasingly simple to draw districting maps with absolute precision ...," *id.* at 10, and state that "[a]s the trial evidence in this case confirms, zero population deviation is an even simpler task in today's redistricting world." *Id.* at 11.[1]

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[1] Appellees imply that Pennsylvania's congressional redistricting plan is an anomaly for containing a population deviation greater than 1. *See* Motion to Affirm at 1-2. However, the chart cited by Appellees shows that a number of state legislatures have enacted congressional plans with maximum population deviations greater than that of Act 1, including: Arkansas – 303; Georgia – 72; Idaho – 3,595; Indiana – 102; Iowa – 134; Kansas – 33; Louisiana – 240; New Hampshire – 636; New Mexico – 166; and Virginia – 38. *See* www.ncsl.org/programs/legman/Redistrict/RedistPopDev.htm. Since 7 states do not have to redistrict because they have only one representative, these 10 states equate to approximately 25% of the 43 states that have, or will be redistricted, with

Appellees, as did the three-judge court below, strip the *Karcher* test of all meaning by advocating that a plaintiff need only proffer a *tabula rasa* map with a population deviation of absolute zero to invalidate a duly-enacted plan. If this is truly the standard, then *Karcher*'s requirement of a good-faith effort and legitimate justification for any deviations – which, as part of the test, exhibited respect for the fact that redistricting is a legislative and political process – are meaningless. Revisiting the *Karcher* standard is critical in order to assure that the components of the test have substance and that the constitutionally-mandated role of the state legislatures is recognized.

Should it undertake to review the *Karcher* test, the Court will be faced with three choices.

First, the Court could uphold the *Karcher* test as applied by the three-judge court to require absolute zero under any and all circumstances and essentially strip the test of all substance. This is the true ramification of

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redistricting plans with a maximum population deviation greater than the Act 1 plan. The Act 1 plan is far from an anomaly.

Two other three-judge federal courts have considered the propriety of a deviation from zero in a congressional redistricting plan based on the 2000 Census. A three-judge court upheld the 33-person deviation in the Kansas congressional redistricting plan in *Graham v. Thornburgh*, No. 02-4087-JAR (D. Kan., issued July 3, 2002) (available online at http://www.ksd.uscourts.gov/redistrict/documents/42.pdf). A three-judge court in Mississippi drew and put in place a congressional redistricting plan with a 10 person deviation, justified on the basis of avoiding precinct splits. *See Smith v. Clark*, 189 F. Supp.2d 529, 539 n.5 (S.D. Miss. 2002) ("In order to achieve absolute perfection, we would have to split precincts [and] [w]e find ... that splitting precincts would cause administrative problems for election officials and confusion and frustration for voters.").

allowing a plaintiff to rely on maps never placed before the General Assembly to meet its *Karcher* burden or that do not respect the legislative policies embodied in the duly-enacted congressional redistricting plan.

Second, the Court could re-ascribe meaning to the first prong of *Karcher* by looking to the redistricting proposals that were before the state legislature when it passed the challenged plan – not at abstract plans concocted for litigation – as evidence of the legislature's good faith. This was the approach taken in *Anne Arundel County Republican Central Committee v. State Advisory Bd. of Election Law*, 781 F. Supp. 394 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992).

Third, the Court could shift the basis of analysis of one-person, one-vote claims from U.S. CONST. art. I to U.S. CONST. amend. XIV. Among all the States, the population deviation between the largest and smallest congressional district (the single districts of Wyoming and Montana) is currently 63%.[2] This disparity makes the standard based on U.S. CONST. art. I (established in *Wesberry v. Sanders*, 376 U.S. 1 (1964), and elaborated on in *Karcher*) suspect. *See Wesberry*, 376 U.S. at 28-29

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[2] Montana has the largest congressional district (population 902,195), while Wyoming has the smallest congressional district (population 493,782). If the total population of the United States is considered, the ideal population for a congressional district would be 645,631 or 645,632. Montana is 256,563 individuals over the "ideal" and Wyoming is 151,850 individuals under the "ideal," making the maximum total population deviation 408,413 (63%). The population and apportionment data used to derive the maximum total population deviation can be found in the following tables available on the U.S. Census Bureau's website (http://www.census.gov/main/www/cen2000.html): (1) Resident Population of the 50 States and (2) Apportionment Population and Number of Representatives by States: Census 2000.

(Harlan, J., dissenting); *see also id.* at 18-19 (Clark, J., concurring in part and dissenting in part); *see also Karcher*, 462 U.S. at 744-750 (Stevens, J., concurring) (explaining that the holding in *Wesberry* has firmer roots in the Equal Protection Clause than in art. I).

The Fourteenth Amendment provides the standard used for legislative redistricting plans. *See Reynolds v. Sims*, 377 U.S. 533 (1964). It permits legislatures to draw legislative redistricting plans that contain a larger population deviation than congressional plans, even though the populations of those districts are much smaller. It seems incongruous to have a different one-person, one-vote standard for legislative and congressional plans. *See Karcher*, 462 U.S. at 765-83 (White, J., dissenting); *see also* Comment, *Reapportionment: A Call for a Consistent Quantitative Standard*, 70 IOWA L. REV. 663 (1985). The equal protection analysis can accommodate the 63% deviation between the Wyoming and Montana districts; the Article I analysis can not.

To uphold a population deviation under the Fourteenth Amendment, all that is needed is a legitimate state purpose. The population difference between the Montana and Wyoming districts occurs because of such a purpose. U.S. CONST. art. I, §2 requires that "each State shall have at least one representative" and U.S. CONST. amend. XIV, §2 requires that "[r]epresentatives shall be apportioned among the several States according to their respective numbers." When the apportionment process was done, Montana did not have a sufficient number to be apportioned two representatives and Wyoming, even though it did not have enough population for even one district, was constitutionally entitled to at least one. The constitutional requirements provide the legitimate state purpose that explains the large disparity between the populations of the single districts of Montana and Wyoming. But, the "as nearly as practicable" standard of

Article I, which under *Karcher* permits no *de minimis* disparity, cannot be met because there are other methods that Congress could use to apportion representatives that would result in less population disparity among districts (e.g., the number of representatives could be increased).

II. Justification Under Prong Two of the *Karcher* Test

In their Motion to Affirm, Appellees contend that Defendants offered the three-judge court only one justification for the 19-person deviation – a desire to reduce precinct splits – and that Presiding Officers are now attempting to meet their burden under *Karcher*'s second prong by simply reciting other legitimate justifications. *See* Motion to Affirm at 15, 18. This is an erroneous characterization of the record.

At trial, Presiding Officers offered, and the three-judge court admitted, legislative journals of the Pennsylvania House and Senate which revealed that the General Assembly was concerned with creating a safe seat for the "Dean" of the Pennsylvania congressional delegation, Democrat Congressman Murtha, *see Anne Arundel County*, 781 F. Supp. at 409 (accepting as a legitimate justification the need to draw a safe seat for Rep. Hoyer, "the fourth ranked Democratic member of the United States Congress"), and preserving the two minority-majority districts in the Philadelphia area. *See id.* at 387. These justifications were also developed in Presiding Officers' post-trial brief. Accordingly, additional justifications were before the three-judge court, which erroneously characterized them as irrelevant. *See* J.S. of Appellants Jubelirer and Ryan at 20-21.

III. Partisan Gerrymandering

In their Motion to Affirm, Appellees repeatedly seek to strengthen the finding that Act 1 was

unconstitutional by characterizing the plan as a partisan gerrymander. *See* Motion to Affirm at 7, 16, 17. They insinuate that the 19-person deviation was a byproduct of the General Assembly's desire to solidify a Republican partisan advantage, *see id.* at 7, going so far as to label the individuals in charge of the Act 1 map-drawing process "political operatives." *Id.* at 5.[3]

The fact remains, however, that Appellees' claim for unlawful partisan gerrymandering was dismissed by the three-judge court for failure to state a claim under *Davis v. Bandemer*, 478 U.S. 109 (1986). In other words, the three-judge court concluded that Appellees had failed to allege facts that, even if true, would show an unconstitutional partisan gerrymander. There is no gray area here. If the partisan aspects of a plan are not unconstitutional, then they must be constitutional. And if constitutional, they cannot provide a basis to consider a legitimate justification – avoiding additional precinct splits – unconstitutional. Beyond that, it simply strains credulity to suggest that the miniscule deviation in Act 1 was tolerated for the very reason that it ensured the success of the alleged gerrymander.

In the final analysis, the one-person, one-vote claim was included in this litigation to pursue partisan political goals that could not be achieved in the legislative process nor through a claim subject to the stringent *Bandemer* analysis. The nominal plaintiffs were stalking horses for political figures opposed to Act 1 but unable to rally support for their views in the appropriate arena. Despite the earlier decision to dismiss the partisan gerrymandering

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[3] It should be noted that Appellees refer to Dr. Memmi's testimony to support this proposition. *See* Motion to Affirm at 4-5. However, the pages of testimony appended to the Motion to Affirm that they reference (pp. 9a, 11a and 12a) do not seem to support Appellees' statement.

claim, much of the trial consisted of testimony about politics, admitted over Presiding Officers' objection as to relevancy, *see* pages of testimony appended to Motion to Affirm at 4a, and ultimately ignored by the three-judge court in its ruling. It is particularly revealing that Appellees' mapping expert was an employee of the Democrat Caucus of the Pennsylvania House of Representatives and that his computer generated maps were never offered in the General Assembly[4] but hoarded for litigation.

The fear enunciated by Justice O'Connor in her *Bandemer* concurrence – that "the losing party or the losing group of legislators in every reapportionment will now be invited to fight the battle anew in federal court" – has been extended beyond the partisan gerrymandering context. *Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring in the judgment only). This Court should not countenance a legal approach to one-person, one-vote claims that allows disappointed political factions to attack a redistricting plan for what are partisan reasons appropriate for legislative consideration but not judicial consideration and thereby "open[] the door to pervasive and unwarranted judicial superintendence of the legislative task of apportionment." *Id.*

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[4] Perhaps because 42 members of the House Democrat Caucus voted in favor of the bill which became Act 1.

CONCLUSION

For the foregoing reasons, in addition to those set forth in Appellants Jubelirer and Ryan's Jurisdictional Statement, this Court should note probable jurisdiction of the appeal and proceed to address the merits of the questions presented.

Respectfully submitted,

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